IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77- 763

---

WALTER S. BRACKETT,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

TIMOTHY N. BLACK
JOHN H. HARWOOD II
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

*Counsel for Petitioner*

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

INDEX—Continued





TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued







TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued





TABLE OF AUTHORITIES—Continued

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-

---

WALTER S. BRACKETT,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

Petitioner Walter S. Brackett, Plaintiff-Appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 18, 1977.

## Opinion Below

The order of the United States District Court for the District of Columbia is not reported and is reproduced at A. 20 of the Appendix. The Judgment of the panel of the United States Court of Appeals for the District of Columbia Circuit (A. 21) is not reported. The opinion of the Court of Appeals (*en banc*) on the issue of retrospective application of *Dorszynski* v. *United States*, 418 U.S. 424 (1974), (A. 1) is not reported.

## Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1970). The judgment of the Court of Appeals was entered on July 18, 1977. By order dated October 6, 1977, the Chief Justice extended the time in which a petition for writ of certiorari may be filed to and including November 28, 1977.

## Questions Presented

This case presents the following important questions concerning the retrospective applicability of four decisions of this Court regarding the constitutional and statutory rights of juveniles and others charged with criminal offenses:

1. Should the Court's decisions in *Kent* v. *United States*, 383 U.S. 541 (1966)—where the Court held that a child is entitled to notice, a hearing, and counsel at a juvenile court proceeding to determine whether the child is to be prosecuted as an adult or treated as a juvenile—and in *In re Gault*, 387 U.S. 1 (1967)—where the Court made clear that the rule in *Kent* is a constitutional one—be given retrospective application? The Circuits and state supreme courts are in conflict on this question.

2. Should the Court's decision in *Dorszynski* v. *United States*, 418 U.S. 424 (1974)—where the Court held that the Federal Youth Corrections Act requires a district court, before sentencing a child to an adult sentence, to make an explicit finding that the child would not benefit from sentencing pursuant to that Act—be given retrospective application? The Circuits are in conflict on this question.

3. Should the Court's decision in *United States* v. *Tucker*, 404 U.S. 443 (1972)—where the Court held that, in imposing a sentence, a district court may not take into account previous convictions that were constitutionally deficient because obtained in violation of the defendant's right to counsel—be given retrospective application?



## Statutes and Regulations Involved

Section 2255 of 28 U.S.C. (1970), the Federal Youth Corrections Act, 18 U.S.C. §§ 5006, 5010, and 5017 (1970), and Sections 11-906, 11-907, and 11-914 of the District of Columbia Juvenile Court Act (1961) are set forth in the Appendix to this Petition. (A. 23-27.)

## Statement of the Case

### A. *Preliminary Statement*

This case arises out of a homicide in 1960 at the National Training School for Boys. Petitioner, who was 14 years of age at the time of the offense, was subsequently made the subject of proceedings in the District of Columbia Juvenile Court and in the United States District Court for the District of Columbia (hereinafter "trial court") which, on the basis of subsequent holdings of this Court, were unconstitutional or contrary to federal statutory requirements, in three respects:

First, in September 1960, the District of Columbia Juvenile Court waived its exclusive jurisdiction over petitioner, then age 15, without affording him effective assistance of counsel, prior notice, or a hearing. Less than a year later Morris A. Kent, age 16, was ushered through the D.C. Juvenile Court processes in the same fashion as petitioner here had been, except that Kent had a lawyer whom the Juvenile Court ignored, while petitioner Brackett had no lawyer at all. In 1966 in *Kent* v. *United States*, *supra*, this Court found that this treatment of Kent violated provisions of the District of Columbia Juvenile Court Act. In 1967 in *In re Gault*, *supra*, the Court made clear that such treatment is also unconstitutional.

Second, the trial court, in sentencing petitioner as an adult in 1961, made no explicit finding that petitioner would not benefit from sentencing under the Federal Youth Corrections Act, and indeed made representations on the record indicating beyond doubt that its sentencing disposition was made without regard to the rehabilitative goals of the Act. In 1974 in *Dorszynski* v. *United States*, *supra*, this Court held that the omission of such an explicit finding is error, requiring remand for reconsideration of the question and, if appropriate, resentencing.

Finally, at petitioner Brackett's 1961 sentencing, the trial court gave explicit attention to petitioner's earlier juvenile convictions—convictions which, petitioner has asserted without contradiction, were obtained in violation of his constitutional right to counsel. In 1972 in *United States* v. *Tucker*, *supra*, the Court held that a 1953 sentence for bank robbery must be vacated because the sentencing court had given "explicit attention" to previous convictions that were invalid because obtained in violation of the constitutional right to counsel.

In short, if petitioner Brackett had in 1960 been afforded the safeguards that, according to this Court, should have obtained in Kent's juvenile waiver hearing in 1961, petitioner might never have been prosecuted as an adult. If the trial court that sentenced petitioner in 1961 had properly considered whether petitioner would benefit from sentencing under the Youth Corrections Act, petitioner might never have been sentenced as an adult. And if the trial court had excluded from its consideration petitioner's prior invalid convictions, petitioner might have received a less harsh sentence. But petitioner had the benefit of none of these safeguards. In consequence, petitioner, at age 15, received the maximum and harshest sentence available for adults for conviction of manslaughter—not less than five nor more than 15 years



—with recommendations that he be confined to a maximum security institution and not receive parole.

This case thus presents in stark terms the questions whether the Court's decisions in *Kent*, *Gault*, *Dorszynski*, and *Tucker* should be given retrospective application. The courts below answered this question in the negative with respect to each decision, though other Circuits and state supreme courts have reached contrary conclusions.

### B. *Facts*

On September 13, 1960, petitioner Brackett, age 14, and two older boys, ages 16 and 17, were charged in District of Columbia Juvenile Court with having committed assault with a deadly weapon two days earlier on an officer of the National Training School for Boys.[1] The boys, who had been confined to the school, were accused of striking and injuring the officer in the course of an escape attempt, and the Government petitioned the Juvenile Court to commence noncriminal proceedings against petitioner.

A month later, the officer suffered a kidney failure and died. Prosecuting attorneys immediately asked the Juvenile Court to waive its exclusive jurisdiction over petitioner so that he could be tried as an adult on charges of first-degree murder. Four days later, the Juvenile Court waived jurisdiction without affording petitioner the benefit of counsel, prior notice, or a hearing. (A. 28.)

On November 7, 1960, an indictment was filed charging petitioner and the other boys with first-degree murder in violation of D.C. Code § 22-2401 (1973) and with murder of an officer of the United States in violation of 18 U.S.C. § 1114 (Supp. V 1975). On January 30, 1961, trial began before the late Judge Alexander Holtzoff. Petitioner initially entered a plea of not guilty

[1] Petitioner was born on September 14, 1945, and thus turned 15 on the day after these charges were filed.

but, after his co-defendants pled guilty to manslaughter charges and the court applied substantial pressure to petitioner's counsel,[2] petitioner agreed to plead guilty to manslaughter, too.

At sentencing, the trial court rejected the request of petitioner's counsel that petitioner, by then age 15, be sentenced under the Federal Youth Corrections Act or that petitioner's youth otherwise be considered a mitigating factor. (A. 42.) The court's approach to the sentencing was purely retributive and reflects no consideration of whether petitioner would benefit from treatment under the Youth Corrections Act—much less an explicit finding that he would not:

> "The fact that these defendants are young is not a mitigating circumstance so far as their crime is concerned. They are really murderers. They were allowed to plead guilty to manslaughter, but their acts could have been held by the jury to constitute murder. They were prisoners in the National Training School for Boys, having been committed under the Federal Juvenile Delinquency Act for stealing automobiles. Each of them has a bad record before this present commitment. They were in a dormitory with 80 other prisoners. There was only one guard during the night. He sat inside, immediately inside the dormitory, at a desk. The door of the dormitory was locked. . . .
>
> "These two defendants, in conjunction with the third defendant, Jankowski, plotted to overpower the

[2] At trial, petitioner relied on, *inter alia*, an insanity defense. In support, he had offered a psychiatrist's report and several witnesses' testimony that petitioner looked "wild" or "crazy" during his participation in the assault. Transcript of sentencing, March 10, 1961, at 224-25, 235, 273. Judge Holtzoff suggested that petitioner should ignore the insanity defense, that the defense was not made in good faith, and that it was worthless (A. 30-31). He further berated petitioner's counsel as "immature" and as showing lack of "mature judgment" because petitioner's counsel declined to advise petitioner to plead guilty (A. 30, 35).



> officer, get the keys from him and make an escape during the night. Brackett, although he is the youngest of the three, was the ring leader and he is apparently the most vicious of the three.
>
> "By a prearranged signal they got out of their beds and walked to the desk and Brackett grabbed a big heavy brass lamp and began to beat the guard over the head with that lamp and, in addition to that, used a big broom. McCracken, according to the evidence, participated in the beating by hitting the guard with his fist. The guard was screaming and pleading for help but Brackett, particularly, did not let up the beating.
>
> "The guard was eventually found on the floor in a pool of blood. He was in a coma for a week and three weeks later he died of this attack.
>
> "Now, obviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants. *The Court is more interested in the fate that befell the guard than it is in the future of these two boys.*
>
> "Now, if they have a spark of humanity—and every human being has; some have a greater spark and some a lesser, but everyone has—they will lie awake many a night in a feeling of remorse for what they have done, and if they have any spark of humanity they will spend many an hour on their knees praying to God and imploring God to forgive them.
>
> "Now, Brackett has shown vicious tendencies. In addition to plotting the escape plan involved in this case, after he pleaded guilty he tried to escape from the Marshal's van. He needs incarceration in a maximum security institution." (A. 42-43.) (Emphasis added.)

Moreover, in determining what adult sentence petitioner should receive, the trial court gave explicit attention to petitioner's prior juvenile convictions. As the foregoing excerpt from the sentencing transcript reflects, the court rejected a request for leniency and for commitment under the Youth Corrections Act because petitioner and one of his co-defendants had

> "been committed under the Federal Juvenile Delinquency Act *for stealing automobiles. Each of them has a bad record . . . .*" (A. 42.) (Emphasis added.)

The court also rejected Youth Corrections Act treatment "because of the nature of the offense *and the nature of the prior records of these defendants*" (A. 43) (emphasis added). The court accordingly gave petitioner the maximum sentence: not less than five nor more than 15 years. The court also recommended that petitioner be committed to "a Federal institution of the maximum security type" (A. 43) and that "he receive no parole."[3]

### C. *Litigation*

On December 10, 1969, petitioner filed a *pro se* motion under 28 U.S.C. § 2255 to vacate his conviction and sentencing. Civ. No. 3497-69. Petitioner was released on parole before the motion was heard, but when his parole was revoked in 1973, petitioner began efforts to reinstate the motion.[4] He sent letters and a new motion to the clerk of the District Court, to various District judges,

---

[3] Transcript of sentencing of Bernard J. Jankowski, March 30, 1961, at 7.

[4] Petitioner was imprisoned until August 1, 1967, for the manslaughter conviction described in the text above. After each of two subsequent convictions, in 1969 in Alabama and in 1973 in South Carolina, petitioner's federal parole was revoked and petitioner served additional time on his original federal sentence. Petitioner was convicted of a further offense in July 1977 and is now imprisoned in the DeKalb County Jail in Decatur, Georgia. Of petitioner's original 15 year sentence for manslaughter, almost five years (1724 days) remain.



and to a lawyer who had been appointed to represent him when petitioner first filed the original motion. After meeting with no success, he sought a writ of mandamus from the Court of Appeals, and Judges Bastian and Robb remanded his motion to the District Court for consideration.[5]

The renewed motion alleged that petitioner's original conviction and sentencing were invalid because, *inter alia*: (1) the trial court had lacked jurisdiction since petitioner had been denied counsel and a hearing at his Juvenile Court waiver proceeding; (2) the trial court had failed to make a finding that he would not benefit from sentencing under the Youth Corrections Act; and (3) in sentencing him, the trial court had taken into account previous juvenile convictions that were invalid because they were obtained without providing him, as an indigent, the assistance of counsel. (A. 47-57).

The Government opposed petitioner's motion on August 5, 1974 (A. 58-65), and the District Court (Green, D.J.) denied the motion the next day, without holding a hearing or appointing counsel for petitioner.[6] The court subsequently denied petitioner's request for leave to proceed *in forma pauperis* on appeal, as well, and stated that it had denied petitioner's Section 2255 motion for the reasons set forth in the Government's opposition. (A. 66.)[7]

---

[5] Order dated May 16, 1974 (A. 45).

[6] Order of August 6, 1974 (A. 20).

[7] With respect to petitioner's first contention the Government had argued that *Kent* is not to be given retrospective application. In response to petitioner's argument that the trial court had failed to make a "no benefit" finding, the Government had said that the court need not state "reasons" for refusing to impose a sentence under the Youth Corrections Act. The Government's only response to petitioner's *Tucker* allegations had been that petitioner had not specified which prior convictions were improperly considered by the trial court.

The Court of Appeals did allow petitioner to proceed *in forma pauperis* and appointed counsel on appeal,[8] but on December 10, 1975 (A. 21), a division of the court affirmed without opinion.[9] Petitioner's suggestion for rehearing *en banc* was granted on July 16, 1976, on the question whether *Dorszynski* should be given retrospective application.

On July 18, 1977, the Court of Appeals affirmed, with two judges (MacKinnon and Robb, JJ.) concurring specially, and two (Bazelon, C.J., and Robinson, J.) dissenting. The majority found (1) that the trial court had, in sentencing petitioner, made an implicit but not an explicit finding that petitioner would not benefit from sentencing under the Youth Corrections Act, and (2) that *Dorszynski* should not be given retrospective application. Judges MacKinnon and Robb were of the view that *Dorszynski* does not require "an *explicit* finding of 'no benefit' in all instances" (emphasis in original) and thus that *Dorszynski* required nothing more than that which occurred in petitioner's case. Chief Judge Bazelon and Judge Robinson dissented because they believed that the record reflected neither an express nor an implied finding of no benefit "and thus conclude[d] that under either a pre- or post-*Dorszynski* standard the sentencing judge failed

[8] Petitioner's counsel before the Court of Appeals was obliged to withdraw in September 1977 and requested present counsel to assume representation of petitioner.

[9] On appeal before the division, petitioner advanced, *inter alia*, the three arguments set forth in the text above, see page 9, *supra*, that were presented to the District Court. The Government responded, in opposition, (1) that, as previously held by the District of Columbia Circuit in *Mordecai* v. *United States*, 137 U.S. App. D.C. 198, 421 F.2d 1133 (1969), *cert. denied*, 397 U.S. 977 (1970), *Kent* should not be given retroactive effect, (2) that the trial court was sufficiently clear in its finding that petitioner would not benefit from Youth Corrections Act sentencing, and (3) that the record does not show reliance by the trial court on a prior conviction obtained in violation of petitioner's right to counsel.



to give the required degree of attention to the possibility of a Youth Corrections Act sentence." [10]

**Reasons for Granting the Writ**

This case involves a ruling on important questions of criminal procedure under the Constitution and laws of the United States as to which the Courts of Appeals and the states' highest courts are in conflict.[11] Petitioner brings to this Court important and recurring issues of wide application involving the temporal reach—prospective only or retrospective—of four significant decisions of the Court that broadly affect the rights and interests of juveniles and others in the criminal justice system. Cases raising these issues have been reaching the Courts of Appeals since the late 1960s and continue to arise, producing different rules of law in different forums.

Moreover, the failure of the Circuits and the states uniformly to give retrospective effect to *Kent*, *Gault*, *Dorszynski*, and *Tucker* runs counter to the principles established by this Court concerning retroactivity. The Court has described as follows the criteria guiding resolution of the question of retroactivity of new rules of criminal procedure:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroac-

[10] A. 15.

[11] In addition to the issues presented here, petitioner argued to the Court of Appeals that the trial court's intrusion into the plea-bargaining process deprived petitioner of effective assistance of counsel. See note 2, *supra*. Although petitioner believes that the decision below on this point is wrong and that the trial judge abused his discretion in coercing petitioner to abandon his legitimate insanity defense, petitioner recognizes that this aspect of the case is not of sufficient general importance to warrant review by this Court at this time.

tive application of the new standards." *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

"Foremost among these factors is the purpose to be served by the new . . . rule." *Desist* v. *United States*, 394 U.S. 244, 249 (1969) (footnote omitted). In fact, the Court has "given complete retroactive effect to the new rule, regardless of good-faith reliance by law enforcement authorities or the degree of impact on the administration of justice, where the 'major purpose of new constitutional doctrine is *to overcome an aspect of the criminal trial that substantially impairs its truth-finding function* and so raises serious questions about the accuracy of guilty verdicts in past trials . . .'." *Adams* v. *Illinois*, 405 U.S. 278, 280 (1972), *quoting Williams* v. *United States*, 401 U.S. 646, 653 (1971) (emphasis added).

The Court has also given retrospective application both to procedural rules that affect important factfinding at stages of the criminal process other than the trial and to rules that ensure the integrity of stages that do not involve factfinding. It has, for example, applied not only the right to counsel at trial retroactively, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), but also the right to counsel on appeal, established in *Douglas* v. *California*, 372 U.S. 353 (1963);[12] the right to counsel at arraignments where pleas are entered and defenses are pled or waived, established in *White* v. *Maryland*, 373 U.S. 59 (1963),[13] and in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); and the right to counsel at dispositional proceedings, established in *Mempa* v. *Rhay*, 389 U.S. 128 (1967).[14] The purpose of these rules is to ensure the careful and focused making of certain critical determinations which may have the most important consequences for a criminal defendant.

[12] See *Smith* v. *Crouse*, 378 U.S. 584 (1964).

[13] Held retroactive in *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968).

[14] See *McConnell* v. *Rhay*, 393 U.S. 2 (1968).



We demonstrate below that the procedural rules articulated in *Kent* and *Gault* are, for purposes of the Court's stated retroactivity test, indistinguishable from the rules in *Hamilton* and *Mempa* and thus should be applied retrospectively. The rules of *Dorszynski* and *Tucker*, while less closely analogous to those in *Hamilton* and *Mempa*, are essential to the integrity of the sentencing process and thus should also be retroactive. Finally, the conflict among the Circuits and the state supreme courts on retroactivity of these cases should be resolved.

### A. *The Decision below Not to Give* Kent *Retrospective Application Conflicts with the Standards Prescribed by This Court for Retroactivity of Its Rulings on Criminal Procedure and with Decisions of Other Circuits and of State Supreme Courts.*

In *Kent* this Court held that, "in the context of constitutional principles relating to due process and the assistance of counsel,"[15] Morris A. Kent was entitled under the District of Columbia Juvenile Court Act to notice, a hearing, and effective assistance of counsel before the Juvenile Court could validly waive its exclusive jurisdiction over him and refer him to the District Court for prosecution as an adult. The court said:

> "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not." 383 U.S. at 554.

[15] 383 U.S. at 557 (footnote omitted).

*Gault* made clear that *Kent*'s requirements are constitutionally based and thus are applicable in all jurisdictions.

There are two reasons why the Court should hear and determine the question whether these principles of *Kent* and *Gault* should be given retrospective application. First, retrospective application is compelled under the standards laid down by this Court in *Stovall*, *Desist*, and *Williams*. Second, the Courts of Appeals and the state supreme court are in conflict on the question.

1. *The Standards of* Stovall, Desist, *and* Williams *Require Retrospective Application of* Kent *and* Gault.

The rule articulated in *Kent* is designed to overcome an aspect of the criminal process "that substantially impairs its truth-finding function." *Williams* v. *United States*, 401 U.S. at 653. The Juvenile Court is "engaged in determining the needs of the child and of society rather than adjudicating criminal conduct," *Kent* v. *United States*, 383 U.S. at 554, but the process of "determining" in a waiver proceeding whether the child is susceptible of rehabilitation is no less factfinding than is the process of determining at trial whether the defendant is innocent or guilty. And the safeguards recognized in *Kent* were plainly designed to assure the integrity of this factfinding process. Indeed, the rule articulated in *Kent* added far more than a fillip that enhanced the reliability of that factfinding proceeding. *Cf. Stovall* v. *Denno*, 388 U.S. at 299-301. For all practical purposes, *Kent* established the existence of the proceeding—notice, hearing, right to counsel, and statement of reasons—for the District of Columbia.

The "special rights and immunities" conferred by the Juvenile Court Act are, moreover, "critically important."



*Kent* v. *United States*, 383 U.S. at 556. Under the Act, the child "may not be jailed along with adults. He may be detained, but only until he is 21 years of age. . . . The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment." *Id.* at 556-57. Most significantly in Kent's case—*just as in the case of petitioner Brackett*—the difference between Juvenile Act and adult treatment could have been "the difference between five years' confinement [six for Brackett] and a death sentence." *Id.* at 557. In short, the factfinding proceeding that the Juvenile Court undertakes in considering waiver could not be of greater moment, particularly in connection with offenses of the gravity of those with which petitioner Brackett was charged.

Moreover, the failure of the courts below to apply *Kent* and *Gault* retroactively cannot be reconciled with the Court's determination to give retrospective application to *Hamilton* v. *Alabama*, *supra*, and *Mempa* v. *Rhay*, *supra*.

In *Mempa* the Court held that a criminal defendant is entitled to counsel at all dispositional proceedings, including those not formally part of the "sentencing" hearing immediately after a finding of guilt. The court said:

> "[T]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent." *Mempa* v. *Rhay*, 389 U.S. at 135.

And in later holding this right to counsel at dispositional proceedings to be fully retroactive,[16] the Court found

---

[16] *McConnell* v. *Rhay*, *supra*.

that it "relates to 'the very integrity of the fact-finding process.' " [17]

The Court has also recognized the equally great need for counsel in juvenile proceedings:

> "[I]n all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances." *In re Gault*, 387 U.S. at 38-39 n.65, quoting from *Report by the President's Commission on Law Enforcement and Administration of Justice*, "The Challenge of Crime in a Free Society" (1967).

It is clear, in light of the enormous consequences of juvenile court waiver proceedings, that such proceedings are at least as dispositional in nature as sentencing proceedings. And the same kind of factfinding occurs at waiver proceedings.

In *Hamilton* the Court held that a criminal defendant is entitled to counsel at an arraignment hearing where he will be required to plead or waive certain defenses, including insanity. 368 U.S. at 53. Although this rule is not designed to prevent errors in determining whether the defendant committed the offense in question, it is essential to determining the defendant's guilt or innocence. One who pleads an insanity defense does not deny having engaged in prohibited conduct but rather asserts that the conduct should not be treated as criminal because of his diminished capacity at the time of the conduct.

---

[17] *Id.* at 3, *quoting Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965).



The same reasoning compels the retroactivity of *Kent* and *Gault*. At a juvenile court waiver proceeding, a juvenile defendant has the opportunity to present a defense that, if successful, is analogous to the insanity defense in *Hamilton*: that, because of his diminished capacity and potential for rehabilitation as a juvenile, he should not be held accountable for conduct that would otherwise be treated as criminal. At the waiver proceeding the juvenile must not only plead that "defense"; he must try it, for the juevnile court determines, in most cases finally, whether the defendant is to be exempted from the full force of adult criminal prosecution.

### 2. *The Courts of Appeals and the State Supreme Courts Are in Conflict on This Question.*

Sharp conflicts exist among the Courts of Appeals and the state supreme courts on the *Kent/Gault* retroactivity question. The Fourth and Tenth Circuits have given *Kent* and *Gault* retrospective application,[18] while the Fifth and D.C. Circuits have not,[19] and in an *en banc* decision the Ninth Circuit overruled an earlier decision applying *Kent* retrospectively.[20] Similarly, while the highest courts of some states have treated *Kent* and *Gault* as retroactive, others have not.[21]

---

[18] *Brown* v. *Cox*, 481 F.2d 622 (4th Cir. 1973) (*en banc*), *cert. denied*, 414 U.S. 1136 (1974); *Kemplen* v. *Maryland*, 428 F.2d 169 (4th Cir. 1970); *Heryford* v. *Parker*, 396 F.2d 393 (10th Cir. 1968).

[19] *Brown* v. *Wainwright*, 537 F.2d 154 (5th Cir. 1976); *Mordecai* v. *United States*, *supra*, and the instant case.

[20] *Harris* v. *Procunier*, 498 F.2d 576 (9th Cir.) (*en banc*), *cert. denied*, 419 U.S. 970 (1974), *overruling Powell* v. *Hocker*, 453 F.2d 652 (9th Cir. 1971). See also *Smith* v. *Cady*, 452 F.2d 141 (7th Cir. 1971), and *Brown* v. *New Jersey*, 395 F.2d 917 (3d Cir. 1968), declining to address the issue; and *Smith* v. *Yaeger*, 459 F.2d 124, 127 (3d Cir. 1972), suggesting in *dictum* that "limited retroactivity may be appropriate."

[21] *Compare, e.g., Marsden* v. *Commonwealth*, 352 Mass. 564, 227 N.E.2d 1 (1967); *State* v. *Lueder*, 137 N.J. Super. 67, 347 A.2d

The courts rejecting retrospective application have without exception failed properly to apply the test of *Adams* v. *Illinois* and *Williams* v. *United States*—that retroactive effect shall be given, regardless of any reliance by law enforcement authorities or impact on the administration of justice,

> "where the 'major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials . . . .'" [22]

These courts have focused on perceived reliance by courts on pre-*Kent* rulings, on feared adverse effects of retroactivity on the criminal justice system, and on supposed impediments to providing a satisfactory remedy. *E.g.*, *Harris* v. *Procunier*, 498 F.2d at 579; *Mordecai* v. *United States*, 137 U.S. App. D.C. at 201-04, 421 F.2d at 1136-39. See also *Brown* v. *Cox*, 481 F.2d at 627-28 In *Harris*, for example, the Ninth Circuit quoted the reference in *Williams* to rules designed to serve the

---

805 (1975); *State* v. *Circuit Court*, 37 Wis.2d 329, 155 N.W.2d 141 (1967), applying *Kent* and *Gault* retrospectively, *with e.g.*, *Arizona* v. *Martin*, 107 Ariz. 444, 489 P.2d 254 (1971) (*en banc*); *In re Harris*, 67 Cal.2d 876, 64 Cal. Rptr. 319, 434 P.2d 615 (1967) (*en banc*); *Florida* v. *Steinhauer*, 216 So.2d 214 (Fla. 1968), *cert. denied*, 398 U.S. 914 (1970); *Smith* v. *Commonwealth*, 412 S.W.2d 256 (Ky. Ct. App.), *cert. denied*, 389 U.S. 873 (1967); *State* v. *Hance*, 2 Md. App. 162, 233 A.2d 326 (1967); *People* v. *Terpening*, 16 Mich. App. 104, 167 N.W.2d 899 (1969); *Powell* v. *Sheriff*, 85 Nev. 684, 462 P.2d 756 (1969); *Bouge* v. *Reed*, 254 Ore. 418, 459 P.2d 869 (1969) (*en banc*); *Commonwealth* v. *James*, 440 Pa. 205, 269 A.2d 898 (1970); *Cradle* v. *Peyton*, 208 Va. 243, 156 S.E.2d 874 (1967), *cert. denied*, 392 U.S. 945 (1968); *Brumley* v. *Charles R. Denney Juvenile Center*, 77 Wash.2d 702, 466 P.2d 481 (1970) (*en banc*), applying *Kent* and *Gault* prospectively only.

[22] *Adams* v. *Illinois*, 405 U.S. at 280, *quoting Williams* v. *United States*, 401 U.S. at 653.



truth-finding function of "the criminal trial" [23] and grounded its decision on the theory that "a certification hearing is not a trial, but a hearing." 498 F.2d at 579. That distinction fails to account for the Court's decisions giving retrospective application to such cases as *Hamilton*, *Mempa*, and *Douglas* v. *California*, *supra*, and thus is clearly without merit.

Nor does the supposed difficulty of devising a remedy justify the failure to apply *Kent* retroactively. In *Mordecai*, where a 24 year old petitioner sought to have his conviction vacated because of a waiver proceeding that did not conform to *Kent* standards, the Court denied relief because of "the impossibility of according the appellant an adequate remedy. . . ." 421 F.2d at 1139. No remedy was possible, according to the Court, because the Juvenile Court no longer had jurisdiction over the petitioner and "nonpunitive rehabilitation" would no longer be available. *Id.* at 1138. In *Kent*, however, the Supreme Court specifically rejected this very contention: It remanded to the District Court for a hearing *de novo* on waiver. "If that court finds that waiver was inappropriate, petitioner's conviction must be vacated." 383 U.S. at 565. If waiver was determined to be proper, the District Court was directed to enter "an appropriate judgment," *id.*, presumably dismissing the habeas corpus petition. See also *United States* v. *Rundle*, 438 F.2d 839 (3d Cir. 1971).

### B. *The Decision below Not to Give Retrospective Effect to* Dorszynski *Conflicts with the Standards Prescribed by This Court for Retroactivity and with Decisions of Other Circuits.*

In *Dorszynski* this Court recognized that in the Federal Youth Corrections Act, enacted in 1950,[24] Congress had

---

[23] 401 U.S. at 653.

[24] 18 U.S.C. §§ 5005-5026, 64 Stat. 1087.

expressed its legislative judgment that federal courts must accord young offenders special consideration in imposing sentences. "The Act was . . . designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket [16 to 22], to rehabilitate them and restore normal behavior patterns." *Dorszynski* v. *United States*, 418 U.S. at 433. The Act therefore provides that, before a court may sentence an eligible offender under the penalty provision that would govern in the Act's absence, "the court shall find that the youth offender *will not derive benefit*" from the rehabilitative alternatives provided in the Act. 18 U.S.C. § 5010(d).

In *Dorszynski* the Court held that the "no benefit" finding must be explicit. 418 U.S. at 444. It noted that any different requirement would leave "unclear whether . . . the court believed petitioner to be legally ineligible for treatment under the Act—*which would be error*—or whether, realizing he was eligible, nevertheless deliberately opted to sentence him as an adult." *Id.* (emphasis added).

Such an error might well have a major effect on the outcome of the sentencing. Under the Act, a court might suspend sentencing and place the youth offender on probation, 18 U.S.C. § 5010(a); sentence him to non-prison custody of the Attorney General for no more than six years, 18 U.S.C. §§ 5010(b), 5017(c); or sentence him to non-prison custody of the Attorney General for longer than six years but with mandatory discharge at least one year before the maximum amount of the otherwise applicable sentence, 18 U.S.C. §§ 5010(c), 5017(d). The adult sentence imposed on petitioner here, when he was 15 years of age, was the maximum permitted—from five to 15 years incarceration in a maximum security prison.

Thus, a court's failure to consider Youth Corrections Act sentencing, and to exercise its discretion on the facts of



each case in imposing such sentencing, is an error that affects the very essence of the sentencing proceeding. It is a failure to consider the special facts of a youth offender's individual circumstances as expressly required by Congress—in short, an abdication of a critical fact-finding function. The rule of *Dorszynski*, requiring an explicit finding of no benefit, is designed to assure that such fundamental errors do not occur, and the instant case provides a graphic illustration of why the rule is necessary. The trial court made no reference at all in the 1961 sentencing proceeding to the question whether petitioner Brackett would benefit from sentencing under the Act. The court was, in its own words, "more interested in the fate that befell the guard than it is in the future of these . . . boys." (A. 43.)

The question presented is whether the *Dorszynski* rule should be given retroactive effect here and in other cases. Application of the principles articulated by the Court in past decisions demonstrates that it should. The question is important and has resulted in a conflict in the Circuits.[25]

1. *This Court's Rules of Retroactivity Require Retrospective Application of* Dorszynski.

The Court has previously made clear that the constitutional right to counsel at dispositional hearings is fully retroactive, noting that "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence

[25] In deciding not to give *Dorszynski* retrospective effect, the Court of Appeals expressly differentiated below between issues raised in appeals and those raised in collateral attacks, holding that retroactivity may consistently be given in the first situation while not in the second. This Court has sharply criticized this approach, recognizing that such distinctions are illogical. *E.g.*, *Williams* v. *United States*, 401 U.S. at 657 and n.9.

is apparent." *McConnell* v. *Rhay*, 393 U.S. at 4, *quoting Mempa* v. *Rhay*, 389 U.S. at 135. The *Dorszynski* rule that the sentencing court must make a no benefit finding, and must make it expressly, serves the same fundamental purpose as that of the right to counsel at sentencing—to ensure that the court's attention is turned specifically to the relevant issues respecting sentencing, and in particular to an issue whose consideration Congress has mandated.[26]

2. *The Courts of Appeals Are in Conflict on This Question.*

The Courts of Appeals are widely split on the question whether *Dorszynski* should be given retrospective application. As the District of Columbia Circuit said below, "Our limitation of the retroactivity of *Dorszynski* is concededly at odds with holdings in other circuits." (A. 10.) The Fourth, Fifth, and Eight Circuits have uniformly applied *Dorszynski* retroactively,[27] while the D.C., Third, and Tenth Circuits have applied it only prospectively.[28] The Ninth Circuit has given the rule retroactive effect at least once,[29] and on a subsequent occasion declined to address the question.[30] The Sixth Circuit has at least twice avoided consideration of the issue,[31] and the Second Circuit suggested in a pre-*Dorszynski* opinion that it would not apply its explicit finding rule retrospectively.[32]



These conflicts among the Circuits should be resolved. The courts rejecting retroactivity have, as in the case of

---

[26] It is unlikely that a rule giving *Dorszynski* retroactive application would result in the imposition of undue burdens on the criminal justice system; nor would such a rule offend the good faith reliance of District judges on some longstanding contrary principle. *Stovall* v. *Denno*, *supra*. First, the District judges in at least three Circuits had, prior to *Dorszynski*, been required by their own Courts of Appeals to make explicit no benefit findings. See *Brooks* v. *United States*, 497 F.2d 1059 (1974), *modified on other grounds*, 531 F.2d 317 (6th Cir. 1975); *United States* v. *Kaylor*, 491 F.2d 1133 (2d Cir.) (*en banc*), *vacated on other grounds*, 418 U.S. 909 (1974); *United States* v. *Coefield*, 155 U.S. App. D.C. 205, 476 F.2d 1152 (1973) (*en banc*). Second, it is improbable that a large number of persons who were improperly sentenced under *Dorszynski* remain in prison today: The requirement of a no benefit finding applies only to youth offenders who are in the federal system and were 21 or younger at the time of conviction; and the vast majority of eligible youths were in fact sentenced under the Act, as was intended. Third, the earliest Court of Appeals decision holding that something other than an explicit finding was permissible issued on December 20, 1972, see *United States* v. *Jarrett*, 439 F.2d 1135 (3d Cir. 1971), only 15 months before *Dorszynski* itself was decided on March 20, 1974. Thus, except for that short period of time, there was no precedent for making less than an explicit no benefit finding and, therefore, nothing on which District judges might have relied.

[27] *United States* v. *Flebotte*, 503 F.2d 1057 (4th Cir. 1974); *United States* v. *Bailey*, 509 F.2d 881 (4th Cir. 1975); *McCray* v. *United States*, 542 F.2d 1246 (4th Cir. 1976); *Hoyt* v. *United States*, 502 F.2d 562 (5th Cir. 1974); *United States* v. *Scheffer*, 506 F.2d 922 (5th Cir. 1975); *Robinson* v. *United States*, 536 F.2d 1109 (5th Cir. 1976); *Walls* v. *United States*, 544 F.2d 236 (5th Cir. 1976); *Sappington* v. *United States*, 518 F.2d 28 (8th Cir. 1975); *Brager* v. *United States*, 527 F.2d 895 (8th Cir. 1975); *Tasby* v. *United States*, 535 F.2d 464 (8th Cir. 1976); *DeVerse* v. *United States*, 536 F.2d 804 (8th Cir.), *cert. denied*, 429 U.S. 897 (1976); *United States* v. *Scruggs*, 538 F.2d 214 (8th Cir. 1976); *Rivera* v. *United States*, 542 F.2d 478 (8th Cir. 1976).

In addition, the District of Columbia Court of Appeals has given *Dorszynski* retrospective application in appeals from sentencings that occurred before *Dorszynski*. *E.g.*, *Smith* v. *United States*, 325 A.2d 180 (D.C. Ct. App. 1974).

[28] *Owens* v. *United States*, 383 F. Supp. 780 (M.D. Pa. 1974), *aff'd without opinion*, 515 F.2d 507 (3d Cir.), *cert. denied*, 423 U.S. 996 (1975); *Jackson* v. *United States*, 510 F.2d 1335 (10th Cir. 1975).

[29] *Belgarde* v. *United States*, 503 F.2d 1054 (9th Cir. 1974).

[30] *Rewak* v. *United States*, 512 F.2d 1184 (9th Cir. 1975). In addition, the District of Columbia Court of Appeals has applied to rule retroactively. *E.g.*, *Smith* v. *United States*, 325 A.2d 180 (D.C. Ct. App. 1974).

[31] *Coleman* v. *United States*, 532 F.2d 1062 (6th Cir.), *cert. denied*, 429 U.S. 847 (1976); *McKnabb* v. *United States*, 551 F.2d 101 (6th Cir. 1977).

[32] *United States* v. *Kaylor*, *supra*.

those dealing with the *Kent* and *Gault* issue, failed to focus on what, under this Court's rulings, is the central retroactivity question: whether the *Dorszynski* rule is essential to the integrity of the sentencing process. The reasoning of the Second Circuit in *United States* v. *Kaylor*, for example, is inapposite, because the court considered only the second and third factors enumerated in *Stovall* (reliance and effect on the administration of criminal justice) and not the first and most important factor—the purpose of the rule requiring an explicit finding.

The D.C. Circuit has rejected retroactivity on the ground that no adequate remedy was available, noting that in *Mordecai* it had followed the same course for the same reason with respect to *Kent*.[33] But as noted above, this disposition in *Mordecai* was clearly wrong: This Court was confronted in *Kent* with precisely the same facts as those in *Mordecai*, and the Court specifically rejected the contention that no adequate remedy was available. The Court held that if waiver was improper, the conviction of Kent must be vacated.

Here, by the same token, the case should be remanded to the District Court for a hearing, *nunc pro tunc*, on whether petitioner should have been sentenced under the Youth Corrections Act. Petitioner's conviction should be vacated if it is determined on remand (1) that Youth Corrections Act treatment would have been appropriate and (2) that such treatment cannot now be afforded. Alternatively, the remainder of petitioner's adult sentence—approximately four years—should be set aside. If, on the other hand, the District Court were to find that the trial court's rejection of youth sentencing was apt, it should enter an appropriate order.

---

[33] A. 7.



### C. *The Failure of the Court below to Give* Tucker *Retrospective Application Conflicts with the Standards Prescribed by This Court for Retroactivity and with Decisions of Other Circuits and of State Supreme Courts.*

Petitioner alleged in his *pro se* Section 2255 motion that his sentence is invalid under *United States* v. *Tucker* since the trial judge had given attention to petitioner's earlier convictions and those convictions were improperly obtained in violation of petitioner's constitutional right to counsel. The Government's response, which was adopted by the District Court (A. 66), said only that

> "[w]ithout indicating more specifically what prior convictions or what statements or under what circumstances they were made, these allegations must be considered insufficient as stating any grounds for relief." (A. 69.) (Citations omitted.)

The Court of Appeals affirmed without opinion. (A. 20.)

It seems improbable that the basis of the Court of Appeals' affirmance could have been the rationale offered by the Government and relied on by the District Court, since the Government's position was so clearly wrong. First, the sentencing transcript that was before the District Court, the Court of Appeals, and this Court (A. 40-44) demonstrates that the sentencing judge did give attention to petitioner's earlier convictions. Second it is clear that if, as petitioner contended in his motion, petitioner was improperly denied counsel at the proceedings leading to those convictions, the convictions were invalid. *Berry* v. *City of Cincinnati*, 414 U.S. 29 (1973); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *In re Gault*, *supra*. And third, it is clear that petitioner's allegation of these facts is sufficient to state a claim for relief, see *Berry* v. *City of Cincinnati*, *supra*; *Kitchens* v. *Smith*, 401 U.S. 847 (1971), and entitles him, at a minimum, to a hearing. See 28 U.S.C. § 2255 ("Unless the motion and the files

and records of the case *conclusively* show that the prisoner is entitled to no relief, the court *shall* . . . grant a prompt hearing thereon . . . ." (Emphasis added.)).[34]

The only other possible basis for the Court of Appeals' decision is a determination that *Tucker* should not be given retrospective application—an issue briefed before the Court of Appeals. Such a result, however, is contrary to the principles of retroactivity articulated in the decisions of this Court and is in conflict with the decisions of other Circuits and of the state supreme courts.[35]

This Court's decisions reflect the special importance of the right to representation by counsel at trial. The Court has held that, in the absence of waiver, a conviction of "an offense, whether classified as petty, misdemeanor, or felony" is invalid if it was obtained in a court that denied the defendant the assistance of a lawyer. *Argersinger* v. *Hamlin, supra; Gideon* v. *Wainwright, supra.* And the Court has held this rule to be fully retroactive.[36]

This Court has also made clear that convictions invalid under *Argersinger* or *Gideon* may not be relied on in later prosecutions to prove guilt or to increase punishment. Thus, in *Burgett* v. *Texas*, 389 U.S. 109 (1967), the Court reversed a conviction obtained in the following

[34] If the Court of Appeals had based its affirmance on the contention made by the Government before the trial court, summary reversal would be appropriate here.

[35] There is also a conflict in the Circuits on the question whether a habeas petitioner must, before obtaining relief under *Tucker* in the federal courts, exhaust all his state remedies, including all avenues of collateral attack under state law. That question is not presented here, since petitioner Brackett was tried, convicted, and sentenced in the United States District Court for the District of Columbia where he subsequently filed the Section 2255 motion that led to this review proceeding.

[36] See *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963), and *Kitchens* v. *Smith, supra*, respecting the retroactivity of *Gideon; Berry* v. *City of Cincinnati, supra*, holding *Argersinger* retroactive.



circumstances: An indictment charging petitioner with assault contained allegations of previous felony convictions—allegations that, if proved, would have increased the punishment under the state recidivist statutes. The indictment was read to the jury at the beginning of the trial, and records of the convictions were offered in evidence during trial, although it appeared that at least one conviction had been obtained in violation of *Gideon*. The Court held:

> "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt *or enhance punishment for another offense* (see *Greer* v. *Beto*, 384 U.S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115 (emphasis added).

In *United States* v. *Tucker*, 404 U.S. 443 (1972), the Court applied *Burgett* to hold that a sentence imposed by a judge who "gave explicit attention" to prior convictions that were void under *Gideon* is also invalid.[37] Thus, *Burgett* and *Tucker* make clear that neither the jury nor the judge can consider prior invalid convictions in any context—recidivist statutes or sentencing—that could result in increased punishment.

The *Tucker* rule clearly warrants retrospective application. Its underpinning—the *Burgett* holding—has already been applied retrospectively. See *Loper* v. *Beto*, 405 U.S. 473 (1972). Indeed, in *Tucker* itself the rule of the *Burgett* case was applied to a sentence that antedated the 1967 *Burgett* decision. Moreover, the Courts of Appeals[38]

[37] The Chief Justice and Mr. Justice Blackmun concurred in the principle enunciated by the Court in *Tucker* but dissented with respect to its application to particular facts of Tucker's case.

[38] *E.g., United States* v. *Walters*, 526 F.2d 359 (3d Cir. 1975); *Irby* v. *Missouri*, 502 F.2d 1096 (8th Cir. 1974), *cert. denied*, 425

and the state supreme courts [39] have uniformly treated *Tucker* as retroactive. The Court of Appeals' failure here to remand for a hearing on petitioner's *Tucker* allegations was, therefore, clear error and should be reversed.

## CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY N. BLACK
JOHN H. HARWOOD II
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
*Counsel for Petitioner*

November 28, 1977

---

U.S. 997 (1976); *Collins* v. *Buchkoe*, 493 F.2d 343 (6th Cir. 1974); *United States* v. *Radowitz*, 507 F.2d 109 (5th Cir. 1974); *Mitchell* v. *United States*, 482 F.2d 289 (5th Cir. 1973); *Craig* v. *Beto*, 458 F.2d 1131 (5th Cir. 1972); *Garrett* v. *Swenson*, 459 F.2d 464 (8th Cir. 1972); *Lipscomb* v. *Clark*, 468 F.2d 1321 (5th Cir. 1972); *Russo* v. *United States*, 470 F.2d 1357 (5th Cir. 1972).

[39] *E.g.*, *Commonwealth* v. *Calvert*, 344 A.2d 797 (Pa. 1975); *People* v. *Moore*, 391 Mich. 426, 216 N.W.2d 770 (1974); *Howard* v. *State*, 280 So.2d 705 (Fla. Ct. App. 1973); *Towers* v. *Director, Patuxent Institution*, 16 Md. App. 678, 299 A.2d 461 (Ct. Spec. App. 1973); *Crowe* v. *State*, 194 N.W.2d 234 (S. Dak. 1972).

**APPENDIX**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77- **763**

---

WALTER S. BRACKETT,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

# INDEX

**Opinion of the Court of Appeals *en banc*, July 18, 1977**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 75-1495

UNITED STATES OF AMERICA

v.

WALTER S. BRACKETT,
*Appellant*

---

ON REHEARING EN BANC

---

Argued November 17, 1976

Decided July 18, 1977

*Larry P. Ellsworth* (appointed by this court) for appellant.

*Mark H. Tuohey, III*, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney and *John A. Terry*, Assistant United States Attorney were on the brief, for appellee.

Before: BAZELON, *Chief Judge*, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*, sitting *en banc*.

Opinion for the court by *Circuit Judge* MCGOWAN, in which *Circuit Judges* WRIGHT, TAMM, LEVENTHAL, and WILKEY join.

Separate concurring opinion by *Circuit Judge* MACKINNON, in which *Circuit Judge* ROBB joins.

Dissenting opinion by *Chief Judge* BAZELON, in which *Circuit Judge* ROBINSON joins.

MCGOWAN, *Circuit Judge*: In this appeal from the denial by the District Court of appellant's motion for collateral relief under 28 U.S.C. § 1255, the court *en banc* addresses the single issue of the retrospective reach of *Dorszynski* v. *United States*, 418 U.S. 424 (1974).

## I

In 1960 appellant, then an inmate of the National Training School for Boys, assaulted a guard in an attempt to escape, and was indicted for first degree murder. Juvenile Court jurisdiction was waived, and appellant pleaded guilty in the District Court to manslaughter. On March 10, 1961, he came before the court for sentencing. Since he was then 15 years of age and therefore eligible for sentencing under the Federal Youth Corrections Act, 18 U.S.C. § 5010, his counsel requested that he be considered for sentencing under that statute. After observing that youth "is not a mitigating circumstance" so far as the crime in question was concerned, and that appellant and his co-defendant were "really murderers" who had been allowed to plead guilty to a lesser charge, and who had prior bad records, the judge denied counsel's request in these terms:

> Now, obviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants. The court is more interested in the fate that befell the guard than it is in the future of these two boys.
>
> * * * *
>
> Now, Brackett has shown vicious tendencies. In addition to plotting the escape plan involved in this case, after he pleaded guilty he tried to escape from the Marshal's van. He needs incarceration in a maximum security institution.



An adult sentence of 5 to 15 years was thereupon imposed; and no appeal was taken.

On December 10, 1969, appellant filed in the District Court a *pro se* motion under § 2255. Although counsel was appointed for him, no action of any kind appears to have been taken until 1974 when appellant *pro se* filed a second § 2255 motion in this court. That was returned to appellant with notification that the District Court was the proper place for filing. When he again submitted his motion to this court, it was referred to the District Court for disposition, where it was denied without a hearing as raising no meritorious issue. A division of this court affirmed without opinion.

Although a number of issues had been raised in the District Court and on appeal, appellant's petition for rehearing and suggestion for rehearing *en banc* asserted only that appellant had been improperly denied Youth Corrections Act treatment because there had been no express finding, as required by *Dorszynski*, that appellant would derive no benefit from such treatment. Because of our concern that, as alleged by appellant, divisions of this court may not have been applying *Dorszynski* uniformly, the appeal was placed *en banc*, as our order stated, "for the purpose of considering whether (*Dorszynski*) shall be applied retroactively . . ."

## II

The requisite manner of implementation of § 5010(d) of the Youth Corrections Act had heavily engaged the attention of this court prior to *Dorszynski*. That section provides that an adult sentence may be imposed "[I]f the court shall find that the youth offender will not de-

rive benefit from treatment" under the alternatives provided by the Act.[1] In *United States* v. *Waters*, 437 F.2d 722, 725 (1970), we said that the sentencing judge's discretion to impose an adult penalty "is circumscribed by the findings of fact in the individual case which the District Judge is required to make *either explicitly or implicitly*." (Emphasis supplied). And this necessity of an affirmative finding of no benefit, albeit in either express or implied terms, was reasserted by this court in *United States* v. *Ward*, 454 F.2d 992 (1971).

In *United States* v. *Coefield*, 476 F.2d 1152 (1973), we examined the issue *en banc*. The result of that inquiry was a holding that the finding of no benefit must be explicit and not left to implication, together with the addition of a new requirement that the judge making such a finding must state the reasons which impelled him to do

[1] Those alternatives are three in number. One is probation (Section 5010(a)). A second (Section 5010(b)) is commitment to the custody of the Attorney General for treatment and supervision pursuant to the Act, in which event § 5017(c) provides that the defendant must be conditionally released under supervision within four years, and unconditionally discharged within six years. The third (Section 5010(c)) is, upon a finding that maximum benefit from YCA treatment may not be derived within six years, commitment to the custody of the Attorney General for any further period otherwise authorized by law for the offense in question. In this third alternative, Section 5017(c) requires that there shall be conditional release under supervision not later than two years prior to expiration of the term imposed, with unconditional release possible within one year thereafter; and unconditional discharge in any event must occur on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction. Sections 5017(a) and (b) provide that any committed youth offender *may* be released at any time under supervision, and *may* be unconditionally discharged at the expiration of one year thereafter.

A youth offender is defined by the Act as a person under 22 years of age at the time of conviction. The Young Adult Offenders Act, 18 U.S.C. § 4209 (1970), provides that a defendant aged 22 to 26 may be sentenced under the Youth Corrections Act if "the court finds that there is reasonable grounds to believe that the defendant will benefit" therefrom.



so. *Dorszynski* dispensed with this enlarged requirement of the articulation of reasons, but, as we had done in *Coefield*, held that the no-benefit finding must be explicit rather than implicit. In this latter regard, the Supreme Court stopped short of saying that the finding must track the statute *in haec verba*, but it did say (at p. 444) that the required quality of explicitness must be imparted by language "that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act."

When the present appeal was before a division of this court, the issue was joined in terms of whether the sentencing judge in fact met the standards subsequently set in *Dorszynski*. Appellant continues *en banc* to assert that the judge gave no consideration whatever to the possibility of affording appellant Youth Corrections Act treatment. This argument is not literally germane under the terms of our *en banc* grant, but the varying doctrinal development that has occurred over time in this court prompts us to take note of the situation as we see it.

The record reveals that the sentencing judge was clearly aware of the Youth Corrections Act and of appellant's eligibility as a matter of age for disposition under it. The comments made by him seem to us of such a nature as to constitute an implicit finding of no benefit within the meaning of the relevant statutory provision, and of our later interpretation of it in *Waters* and *Ward*.[2] They

[2] The sentencing judge's extensive references to (i) the serious nature of the assault, (ii) the prior criminal involvement of appellant, and (iii) appellant's attempt to escape, are both relevant to, and supportive of, an implication that the court was asserting its conviction that appellant would not respond to YCA treatment and would only disrupt the program with no benefit to himself. The judge's further professions of a seeming unconcern with appellant's rehabilitation argue for a different interpretation of his

were not, in our view, adequate to meet the higher standards of explicitness prescribed by this Court in *Coefield*, and more importantly by the Supreme Court in *Dorszynski*. These premises, are, thus, the point of departure for our consideration of the retroactivity issue framed by our *en banc* order.

III

Aged 15 at the time he was sentenced, appellant is now 31. In the intervening years, the sentencing judge has died, and appellant has twice been released on parole by the federal authorities, but each parole was subsequently revoked for parole violation. Released again in 1975 to the custody of South Carolina, he is presently out on parole from a South Carolina sentence of ten years for a criminal violation in that state. In his brief *en banc*, appellant asserts that, in the "unique facts presented by this case," resentencing under the Youth Corrections Act could only take the form, not of exposure to rehabilitative supervision, but of a release from further obligation under his federal sentence. This, so it is said, flows from the fact that the maximum sentence that can be given under YCA equals the maximum adult sentence, and time on parole is credited even if parole was subsequently revoked. Appellant received the maximum adult sentence of 15 years, and he has already served more than 15 years if his time out on parole is credited, which it is not in respect of an adult sentence but is under a YCA sentence.

We do not pursue this question of the precise relief to which appellant might be entitled if a remand for YCA sentencing were to be ordered, except to remark that, as envisioned by appellant, it does not entail his involuntary subjection to the improving influences of the Youth Cor-

---

ruling, but we do not find them, in the entire context, inconsistent with a no-benefit conclusion.



rections Division. We think, rather, that the facts giving rise to the claim are significant only as they illuminate the policies relevant to retroactivity. Those policies have been identified by the Supreme Court as involving three factors: (1) the purpose to be served by the new standards, (2) the extent of reliance by public authorities on the old, and (3) the effect of retroactivity on the administration of justice. *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

The objective of the Supreme Court in its ruling in *Dorszynski* was to assure that the sentencing judge will give conscious consideration to YCA treatment for youthful offenders who might, because of the very fact of their youth, be saved from a life of crime by the youth-oriented treatment provided by Congress to this end in the YCA. Congress prescribed the age limits for that particularized rehabilitative effort. Appellant has long since exceeded them, as will have many, if not indeed most, others who collaterally challenge their sentences. This court confronted a similar problem in *Mordecai* v. *United States*, 421 F.2d 1133 (1969), *cert. denied*, 397 U.S. 977 (1970). There we refused to give retroactive application to the holding in *Kent* v. *United States*, 383 U.S. 541 (1966), in a collateral attack by a prisoner who had not been afforded the hearing required by *Kent* before a juvenile offender is waived for adult trial. In doing so the court noted the fact that the defendant was no longer a juvenile, and that no remedy was currently available to tap the rehabilitative potential of youth, stating (at 1138) that "even if nonpunitive rehabilitation in the juvenile process would have been the proper path in 1961, society can no longer offer what was then, rightly or wrongly, denied . . ."

The reliance interest in these circumstances is perhaps of less significance, although it is likely that the sentencing judge's action in this instance was not out of keeping

with what were considered to be a sentencing judge's responsibilities at the time this sentence was imposed, and indeed as they were later defined to be by this court in *Waters* and *Ward*. The statute in question had been on the books for 24 years before the Supreme Court authoritatively prescribed the manner of its implementation. The varying and, as it turned out, not wholly successful development of implementation doctrine in our own court demonstrates the several faces which the statutory language apparently presented to individual judges, especially those charged with the traditionally awesome responsibility of criminal sentencing.[3]

With respect to the effect upon the administration of justice, there are obvious problems in deciding anew the delicate question of susceptibility to YCA treatment many years—in this case, 16—after the initial sentence. Not infrequently, as here, the sentencing judge will no longer be available. The task of recreating the conditions under which the first sentence was imposed holds the threat of more administrative burdens on a criminal justice system that is already overloaded. And surely those charged with the intensely important work of trying to save truly youthful offenders from blighted lives will not be aided by the prospect of the appearance among their charges of persons who have matured beyond the statutory age limits in the criminal environment.[4]

---

[3] Limitations on retroactivity are not, of course, confined to constitutional holdings. *See* Halliday v. United States, 394 U.S. 831 (1969). In concluding not to give retroactive application to an interpertation by it of Rule 11, FED. R. CRIM. P., McCarthy v. United States, 394 U.S. 459 (1969), the Court stated (at 832) that it approached the problem by reference to "the same criteria we have employed to determine whether constitutionally grounded decisions that depart from precedent should be applied." *And see* Judge Leventhal's useful discussion of the concept of reliance in his concurring opinion in *Mordecai, supra*.

[4] As an appendix to his brief *en banc*, appellant has supplied some Administrative Office figures as indicating that the number of



There comes a time, in the criminal law as elsewhere, where the more remote past can not be set to rights in response to late-blooming legal doctrine, at least not without impairment of other vital interests. This is such a case, and because we believe it to be characteristic of those that will arise on collateral attack, we state our judgment to be that the retrospective operation of *Dorszynski* shall, in respect of sentences imposed prior to the issuance of our decision in *Coefield*, be restricted to direct appeals arising therefrom.[5] This differentiation of direct appeals from collateral attacks is one that has heretofore been recognized by this court as justifiable in appropriate circumstances. *See Pendergrast* v. *United States*, 416 F.2d 776, 782, *cert. denied*, 395 U.S. 926 (1969), and cases therein cited. We think the circumstances presented by this record warrant its utilization in the area addressed today by this court *en banc*.[6]

---

persons likely to benefit from full retroactivity for *Dorszynski* is not such as to create apprehensions about burdening the criminal justice system. The figures on their face are not impressively supportive of appellant's point, since they reveal very substantial numbers of defendants in the period from 1965 to 1972 receiving adult sentences despite their age eligibility for YCA. This presumably reflects the growing national concern about the participation by young people in serious crime.

[5] We use *Coefield* as the measuring date for the reason that *Coefield* made it the law of this circuit that the no-benefit finding must be explicit. *Dorszynski* adopted the same rule; and its invalidation of *Coefield's* additional requirement of the statement of reasons has no bearing on the issue immediately before us. Appellant is, of course, not helped by *Coefield* because his sentence occurred 12 years earlier, and there was no direct appeal.

[6] Coming down on the side of non-retroactivity in a 2255 case is the Tenth Circuit. Jackson v. United States, 510 F.2d 1335 (10th Cir. 1975). And, in another retroactivity context, see the apparently approving reference to *Jackson* in Bailey v. Holley, 530 F.2d 169, 173 (7th Cir. 1976). The Second Circuit, in its *en banc* pre-*Dorszynski* ruling like ours in *Coefield*, requiring both an explicit finding and a statement of reasons, expressly made that ruling non-retroactive. United States v. Kaylor, 491 F.2d 1133 (2nd Cir. 1973),

The District Court is, accordingly, affirmed.

*It is so ordered.*

---

vacated and remanded for reconsideration in the light of *Dorszynski*, *sub nomine* United States v. Hopkins, 418 U.S. 909 (1974). *See also* Owens v. United States, 383 F. Supp. 780 (M.D. Pa. 1974), *aff'd* without opinion, 515 F.2d 507 (3rd Cir. 1974), cert. denied, 423 U.S. 996 (1975), in which the District Court, in a carefully considered opinion, held *Dorszynski* non-retroactive in the context of a 2255 motion.

Our limitation of the retroactivity of *Dorszynski* is concededly at odds with holdings in other circuits. The latest of these appears to be McCray v. United States, 542 F.2d 1246 (4th Cir. 1976). That case involved a collateral challenge under § 2255, but the court, in a one-page *per curiam*, took no note of this fact, and limited its discussion to the assertion that it had "consistently remanded similar cases," citing two of its prior cases, one of which was a direct appeal in which the prosecutor had sought the remand, United States v. Bailey, 509 F.2d 881, 883 (1975), and the other, United States v. Flebotte, 503 F.2d 1057 (1974), was a 2255 which was remanded for resentencing in a 2-paragraph *per curiam* citing *Dorszynski* and a prior Fourth Circuit case, United States v. Ashby, 502 F.2d 1163 (table), from which, since there is no reported opinion, it is impossible to tell whether it involved direct appeal or 2255. The Eighth Circuit is also to the contrary. *See* Brager v. United States, 527 F.2d 895 (1975), which devotes most of its brief discussion to describing the findings which on remand will warrant dismissal of post-conviction applications. *See also* Belgrade v. United States, 503 F.2d 1054 (9th Cir. 1974), and Hoyt v. United States, 502 F.2d 562 (5th Cir. 1974), both of which are very brief *per curiam* dispositions.



MACKINNON, *Circuit Judge*, concurring specially, in which ROBB, *Circuit Judge* joins: I concur in the foregoing opinion except to the extent that it conflicts with the following. It is not my view that *Dorszynski* v. *United States*, 418 U.S. 424 (1974) requires an *explicit* finding of "no benefit" in all instances. In *Dorszynski*, the Chief Justice remarked that:

> An *explicit* finding that petitioner would not have benefited from treatment under the Act would have removed all doubt concerning whether the enlarged discretion Congress provided to sentencing courts was indeed exercised.

418 U.S. at 444 (emphasis added). What evoked this observation was that the sentencing proceeding in *Dorszynski* presented a record in which it was unclear whether

> the options of the Act were considered and rejected [or] whether . . . the court believed petitioner to be legally ineligible for treatment under the Act—which would be error—or whether, realizing he was eligible, nevertheless deliberately opted to sentence him as an adult.

418 U.S. at 444. It was in such circumstances that *Dorszynski* pointed out that an explicit finding of "no benefit" would have resolved that ambiguity in the record.

Elsewhere in the opinion it is stated:

> *Once it is made clear that the sentencing judge has considered the option of treatment under the Act and rejected it, however, no appellate review is warranted.*[1]

The question whether the finding of "no benefit" must be explicit or whether it may be implicit in

---

[1] In my view that is the factual situation here.

the record of a particular case is answered by the manifest desire of Congress to assure that treatment under the Act be considered by the court as one option whenever the youth offender is eligible for it. If the finding may be implied from the record, appellate courts must go on to determine what constitutes a sufficient showing of the requisite implication. To hold that a "no benefit" finding is implicit each time a sentence under the Act is not chosen would render § 5010(d) nugatory; to hold that something more is necessary to support the inference that must be found in the record would create an *ad hoc* rule. Appellate courts should not be subject to the burden of case-by-case examination of the record to make sure that the sentencing judge considered the treatment option made available by the Act.[2] *Literal compliance* with the Act can be satisfied by *any expression* that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act.

418 U.S. at 443-44 (emphasis added).

The Supreme Court thus states that literal compliance with the Act is satisfied if the trial court at the time of sentencing indicates by "any expression" that it: (1) considered the alternative of sentencing under the Act and (2) decided that the youth offender would not derive benefit from treatment under the Act. Therefore, when the sentencing judge in this case said:

> [O]bviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants. . . .

it is clear that he did consider "the alternative of sentencing under the Act." 418 U.S. at 444. It is also clear that when the sentencing judge stated:

> [Brackett] *needs* incarceration in a maximum security institution (emphasis added)

he was stating, as clearly as one could state without echoing the exact "no benefit" language of the statute, that the court concluded Brackett would not derive benefit from treatment under the Act.

It is thus my opinion that the sentence imposed satisfied the Youth Act requirements and was not in conflict with the requirements of *Dorszynski*. There was nothing ambiguous in the sentencing by Judge Holtzoff, like the ambiguity in *Dorszynski*, that created any doubt that "the sentencing judge considered the treatment option made available by the Act" and that such "options of the Act were considered and rejected." Nor is there anything in Brackett's sentencing that creates any doubt that the sentencing judge had considered whether the defendant was "legally [eligible] for treatment under the Act."

The majority opinion does not disagree with this characterization of the trial judge's sentencing. The majority grants that (1) the trial judge made "comments" and "extensive references", and (2) that those statements made clear that "appellant would not respond to YCA treatment." (Maj. op. at 5 & n. 2). *Dorszynski* requires no more.

This is not to say that an incantation of the "no benefit" finding would not more clearly have satisfied the statute. However, to my mind the judge was telling Brackett that he would *not* derive benefit from treatment

---

[2] It is clear here that the sentencing judge did consider the sentencing options.

under the Act when he told him he "*need*[*ed*] *incarceration* in a maximum security institution." The sentencing proceedings thus did not involve any indication that the probation officer or court were uncertain as to the eligibility of the defendant for a Youth Act sentence, such as was present in *Dorszynski*. In my view the sentencing proceeding satisfies all the requirements that *Dorszynski* outlines for a legal sentence, and thus it is not necessary for us to consider whether *Dorszynski* is retroactive.

As I read *Dorszynski* an implicit finding of "no benefit" satisfies the statute unless the basis for reaching the implication is ambiguous. There is no latent ambiguity in the instant sentencing proceeding.



BAZELON, *Chief Judge, dissenting,* in which ROBINSON, *Circuit Judge* joins:

Having decided that *Dorszynski* will not be applied retroactively to collateral attacks on sentences and that the pre-*Coefield* requirement of either an express or implied finding of "no benefit" applies to this case—views which I share—the majority affirms Brackett's sentence because it concludes that the sentencing judge here made the necessary implied finding. On this record, I find neither an express nor implied finding of "no benefit," and thus conclude that under either a pre- or post-*Dorszynski* standard the sentencing judge failed to give the required degree of attention to the possibility of a Youth Corrections Act sentence.

Before pronouncing sentence on Brackett and his codefendant, the district judge asked counsel for their comments. Brackett's attorney stressed his client's youth and urged YCA sentencing; his codefendant's attorney argued that his client's youth, low intelligence, and lesser role in the crime supported leniency and YCA sentencing. The court then expressed its views:

> The fact that these defendants are young is not a mitigating circumstance so far as their crime is concerned. They are really murderers. They were allowed to plead guilty to manslaughter, but their acts could have been held by the jury to constitute murder. They were prisoners in the National Training School for Boys, having been committed under the Federal Juvenile Delinquency Act for stealing automobiles. Each of them has a bad record before this present commitment. They were in a dormitory with 80 other prisoners. There was only one guard during the night. He sat inside, immediately inside the dormitory, at a desk. The door of the dormitory was locked. . . .

These two defendants, in conjunction with the third defendant, Jankowski, plotted to overpower the officer, get the keys from him and make an escape during the night. Brackett, although he is the youngest of the three, was the ring leader and he is apparently the most vicious of the three.

By a prearranged signal they got out of their beds and walked to the desk and Brackett grabbed a big heavy brass lamp and began to beat the guard over the head with that lamp and, in addition to that, used a big broom. McCracken, according to the evidence, participated in the beating by hitting the guard with his fist. The guard was screaming and pleading for help but Brackett, particularly, did not let up the beating.

The guard was eventually found on the floor in a pool of blood. He was in a coma for a week and three weeks later he died of this attack.

Now, obviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants. *The Court is more interested in the fate that befell the guard than it is in the future of these two boys.*

Now, if they have a spark of humanity—and every human being has; some have a greater spark and some a lesser, but everyone has—they will lie awake many a night in a feeling of remorse for what they have done, and if they have any spark of humanity they will spend many an hour on their knees praying to God and imploring God to forgive them.

Now, Brackett has shown vicious tendencies. In addition to plotting the escape plan involved in this case, after he pleaded guilty he tried to escape from



the Marshal's van. He needs incarceration in a maximum security institution. (Emphasis added.)

The court then gave Brackett the maximum adult sentence of five to fifteen years, with recommended commitment in a maximum security facility. Appellant was fifteen years old at the time.

I do not find in the sentencing judge's statement any conclusion, express or implied, that appellant would fail to benefit from Youth Corrections Act sentencing. The judge obviously was aware of this option, but his comments demonstrate that he ruled it out without regard to Brackett's rehabilitative potential under Youth Act treatment. He focused instead on the viciousness of the crime, frankly admitting that he was more concerned with the violence done to the victim than with the reformation of the defendants.[1]

Under either a pre- or post-*Dorszynski* standard, a judge must do more than indicate awareness that the Youth Corrections Act option exists. He must express his decision "that the youth offender would not derive benefit from treatment under the Act." *Dorszynski*, *supra*, at 444. Section 5010(d) of the Act requires that a judge make this finding before resorting to an adult

---

[1] The Youth Corrections Act does not exclude categories of youthful offenders from its coverage, neither those with long records nor perpetrators of vicious offenses nor murderers. These factors may be relevant to the determination of whether a youth will benefit from Youth Corrections Act treatment—either pro or con—but they cannot be relied on as rigid indicators. As the Second Circuit has stated, the sentencing judge should make "a careful appraisal of the variable components relevant to the sentence upon an individual basis" rather than employing "a fixed and mechanical approach in imposing sentence." United States v. Schwarz, 500 F.2d 1350, 1352, (1974) (district judge's statements required vacation of adult sentence because they were susceptible to the interpretation that only ghetto youths are eligible for YCA treatment). *See also* Dorszynski v. United States, 418 U.S. at 450 (Marshall, J., concurring).

sentence because Congress believed that the Youth Corrections Act program would be likely to "provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns." *Dorszynski*, *supra*, at 433.

The majority's effort to recast the judge's discourse in our pre-*Coefield* doctrinal mold falls considerably wide of the mark. The most the majority can say is that some of his remarks are "supportive of [a no-benefit] implication" and that others, which concededly "argue for a different interpretation," assertedly are not "inconsistent with a non-benefit conclusion." Majority op. at 6 n.2. Even assuming arguendo the validity of this analysis, however, it hardly bears out the thesis that the sentencing judge made an implied no-benefit finding within Section 5010(d) as construed in *Waters* and *Ward*. It does not suffice to merely wring some intimation of no-benefit from what the sentencing judge said; at the very least, the question in terms of those decisions is whether the implication is plain and unambiguous. In each of those cases, particular observations viewed in isolation indicated that no benefit from Youth Act treatment was expectable, but there were other observations casting doubt on that reading. *United States* v. *Waters*, 437 F.2d 722, 725-726 (D.C. Cir. 1970); *United States* v. *Ward*, 454 F.2d 992, 993-994, 995 (D.C. Cir. 1971). *See also Dorszynski*, *supra*, at 443-444. In concluding that Section 5010(d) did not tolerate that sort of fuzziness, we held in effect that imprecise expressions could do service as implied no-benefit findings only when the message was clear.

Although the Supreme Court has held that a judge need not give reasons for his finding of "no benefit," [2]

[2] Dorszynski v. United States, 418 U.S. 424, 441-42 (1974).



no one has yet suggested that a judge may impose an adult sentence for reasons other than the defendant's incapacity to be helped by Youth Act treatment. Because the sentencing judge's comments unmistakably show reliance on such impermissible reasons, I would reverse and remand to the District Court for determination of whether Brackett might have benefited from Youth Act treatment at the time of his original sentencing.[3]

[3] If Brackett were found suitable for YCA treatment, he should be released from federal supervision stemming from this conviction because the YCA requires that a youth sentenced thereunder be discharged no later than "the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction." 18 U.S.C. § 5017(d). *See* majority op. at 6-7. *Compare Dorszynski*, 418 U.S. at 429 n.6.

**Order of the District Court denying petitioner's Section 2255 motion, August 6, 1974**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-742

(Criminal No. 953-60)

WALTER STEVE BRACKETT,
*Petitioner*

vs

UNITED STATES OF AMERICA,
*Respondent*

ORDER

Upon consideration of petitioner's Motion to Set Aside and Vacate Judgment of Conviction and respondent's Opposition thereto, it is by the Court this 6th day of August 1974,

ORDERED that petitioner's Motion should be and hereby is denied, and it is

FURTHER ORDERED that this case be and hereby is dismissed.

/s/ June L. Green
JUNE L. GREEN
U. S. District Judge



**Judgment of the panel of the Court of Appeals, December 10, 1975**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

SEPTEMBER TERM, 1975

Civil 74-742 (2255)

Cr 953-60

No. 75-1495

UNITED STATES OF AMERICA

v.

WALTER S. BRACKETT,
*Appellant*

Appeal from the United States District Court
for the District of Columbia

Before: MCGOWAN, TAMM and ROBB, *Circuit Judges*

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

ON CONSIDERATION OF THE FOREGOING, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

The duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk



**Statutes and regulations involved**

1. 28 U.S.C. § 2255 (1970) provides that:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

2. The Federal Youth Corrections Act, 18 U.S.C. §§ 5006, 5010 and 5017 (1970), provide in pertinent part:

§ 5006. Definitions

As used in this chapter—

* * * *

(e) "Youth offender" means a person under the age of twenty-two years at the time of conviction;

* * * *

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or



(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

3. Sections 11-906, 11-907 and 11-914 of the District of Columbia Juvenile Court Act (1961), provide in pertinent part:

§ 11-906. Application of subchapter-Definitions.

(a) This subchapter shall apply to any person under the age of 18 years—

(1) Who has violated any law; or who has violated any ordinance or regulation of the District of Columbia . . . .

* * * *

(b) When used in this subchapter—

* * * *

(3) The word "child" means a person under the age of 18 years. . . .

* * * *

§ 11-907. Jurisdiction—Original and exclusive.

1. *Children.*—Except as herein otherwise provided, the court shall have original and exclusive jurisdiction of all cases and in proceedings:

(a) Concerning any child coming within the terms and provisions of this subchapter.

(b) Concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age, subject to appropriate statutes of limitation.

* * * *

When jurisdiction shall have been obtained by the court in the case of any child, such child shall continue under the jurisdiction of the court until he becomes 21 years of age unless discharged prior thereto: *Provided, however,* That nothing herein contained shall affect the jurisdiction of other courts over offenses committed by such child after he reaches the age of 18.

* * * *

§ 11-914. Waiver of jurisdiction in case of felony—Transfer of case.

If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would



have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.

**Order of the Juvenile Court waiving jurisdiction, October 19, 1960**

By authority vested in me under Section 13 of the Juvenile Court Act of the District of Columbia of June 1, 1938, 52 Stat. 599, ch. 309, as amended, and after full investigation, I do hereby waive jurisdiction over the following offense, which if committed by an adult would be punishable by death or life imprisonment, charged against WALTER STEVE BRACKETT, born September 14, 1945, of National Training School for Boys in the District of Columbia,

> Murder: Date of offense—on or about September 11, 1960, in the vicinity of National Training School for Boys, Columbia Hall; Complainant, William Latimer (deceased)

and I do hereby order said child for trial for such offense under the regular procedure of the D.C. District Court for the District of Columbia.

Dated this 19th day of October, 1960, at Washington, D.C.

/s/ Orman W. Ketcham
Judge

A true copy.
Attest:

/s/ Edith W. Dowden
Acting Clerk
Juvenile Court, D.C.



**Trial transcript. January 31, 1961**

[201] AFTERNOON SESSION

1:45 p.m.

(The following proceedings were had out of the presence of the jury.)

THE COURT: We will proceed with the case on trial.

Will counsel come to the bench, please.

(At the bench:)

THE COURT: Mr. Karr, I have kept the jury in the jury room and I have also asked you gentlemen to come to the bench so that there would be no possibility of anyone overhearing this bench conference.

You know, I am a bit concerned as to whether you gave good advice to your client. In one sense I do not share any responsibility in the matter because you were retained and selected by the defendant, you were not appointed by the Court. If I had appointed you I would be a little more concerned.

Your client is on trial for his life. Have you considered that? He has a possibility of pleading guilty to manslaughter.

The boy Jamison's testimony was one of the most gruesome bits of testimony I have heard in all my years on the bench.

It is all very well for you to claim no causal connection between the beating and the death. You would have [202] a lot of difficulty in disproving Dr. Rosenberg's testimony.

Are you going to have any medical testimony on that point?

MR. KARR: Yes, indeed.

THE COURT: Have you had the defendant examined?

MR. SMITHSON: Yes, Your Honor. He refused to talk to Dr. Cavanagh. He refused to even tell Dr. Cavanagh his name.

THE COURT: I would let you call Dr. Cavanagh.

MR. SMITHSON: I can do even better, Your Honor. He had a psychological test given out there by Dr. Twain, Chief Psychologist, and Dr. Jacobs is a psychiatrist.

THE COURT: But I also will let you call Dr. Cavanagh and let him testify the man refused.

MR. SMITHSON: I intend to.

THE COURT: Because that would show he is not acting in good faith.

MR. KARR: Your Honor—Excuse me, I withdraw this comment at this point.

THE COURT: I am going to admit that evidence, that Dr. Cavanagh tried to see him and he refused to talk to him, because that throws considerable light on the good faith of the insanity defense.

As I say, you have the responsibility for such advice as is given to a client, of course.

[203] How many years have you been practicing?

MR. KARR: Two and a half.

THE COURT: You see, I would not appoint a man with two and a half years' experience to try a murder in the first degree case. I never have. I have always appointed older experienced lawyers because the younger man may be just as good a trial lawyer but he has not got mature judgment.

You have appeared before me in other matters and I have always looked upon you as a promising young lawyer.

MR. KARR: Thank you.

THE COURT: And I still do. But I think you take an awful burden on yourself when you advise your client to contest this case when he has an opportunity to plead guilty to manslaughter.



MR. KARR: I can't tell you, Your Honor, how this has weighed upon my mind. I told you yesterday here at the bench, when you asked me to make a decision, that this is probably one of the most grievious decisions I have ever made in my life, vis-a-vis giving this man advice regarding what I think he should do.

THE COURT: What does he want to do? Or, does he rely solely on your advice? If you prefer not to answer that, don't answer it because, after all, I do not want to pry into the confidential relation between a lawyer and client.

MR. KARR: As Your Honor knows, I have never been [204] less than forthright with Your Honor in all of our dealings in the past and certainly during the course of the trial.

THE COURT: Yes, there is no question about that.

MR. KARR: I don't certainly hesitate to answer your question on that basis. I have informed him of what I think the quality of his defense is. I have informed him fully that he has a perfect right to plead guilty to manslaughter, as did the other two boys, if he so desired. I told him what the penalty was, and he asked me my evaluation of the strength of his defense.

Now, Your Honor, if I had gone out and had had the money in this case to go out and hire a psychiatrist and it was exclusively on the basis of this psychiatrist's testimony that I was grounding my insanity defense, it would be one thing. But, Your Honor, to me, this was a court-appointed entirely impartial psychiatrist, and I have talked—

THE COURT: That psychiatrist's report is not worth the paper it is written on, absolutely not. As a matter of fact, I am surprised that that psychiatrist would render such a report. He does not say what the mental disease of the defendant is. He says it is caused by his psychological make-up and, therefore, the product of mental disease. It does not state what mental disease

he had. I must say that I was amazed at that report. That report can be torn to shreds, Mr. Karr.

[205] What Mr. Smithson said just now is new to me. The fact that the Government sent a psychiatrist to interview him and the defendant refused to talk to the psychiatrist is evidence of his bad faith and certainly is admissible, and I imagine Mr. Smithson will make very strong argument on that issue.

Besides which, if he is insane, he is in for a long term in a lunatic asylum.

MR. KARR: To be sure.

THE COURT: Not just a mental hospital where civilian patients are sent and have the privileges of the grounds and all that. He would be in a locked criminal ward mingling with murderers, rapists, raving maniacs, where he might be assaulted by mad men. Actually, I think he would be happier in the penitentiary.

Now, on the other hand, if he is found guilty of murder in the second degree he would get a much longer sentence, of course, than the maximum of manslaughter, and there is a possibility of his being found guilty of murder in the first degree. I never thought so until I heard Adrian Jamison's testimony. It horrified me.

MR. KARR: I am not certainly happy with the idea, as I said in my opening statement. I am not very happy with the idea that this guard was assaulted and ultimately died, believe me, Your Honor.

[206] THE COURT: I understand. As I say, you are not Court appointed so the Court does not share any responsibility. The defendant will never be in a position to say, "You have appointed a lawyer with insufficient experience for a murder case." He would say, "I have selected my own lawyer." He would have to say that. Or, we would say, "You selected your own lawyer."

For a lawyer with your experience you are doing very well. You are doing much better than the average



lawyer who has had two and a half years' experience. But, after all, this is a murder case, this is a murder in the first degree case.

Wesley McDonald is a very experienced lawyer. He is an experienced trial lawyer, tried every kind of case for many years. Jankowski is the least guilty of the three and, even so, Wesley McDonald advised his client to take advantage of the opportunity to plead guilty to manslaughter.

MR. KARR: I know this, Your Honor.

THE COURT: I am going to drop the matter at this point, but I do say if there is a verdict of guilty of murder in the first degree you will regret it very much. After all, you are gambling with another man's life.

MR. KARR: I am fully aware of this and, believe me, this doesn't lie lightly upon my mind, as I indicated to you yesterday. Frankly—

[207] THE COURT: The least that you perhaps might have done is to say, "I will give you no advice, you make your own decision."

MR. KARR: But a 15-year-old boy, when he asks me for advice—

THE COURT: He is not 15, is he?

MR. KARR: Yes, Your Honor.

MR. SMITHSON: He was 14 at the time.

MR. KARR: Fourteen at the time that this happened. If my son, Your Honor, were charged with this offense, I wouldn't let him make this decision.

THE COURT: Perhaps so. I did not realize he was as young—he looks much older.

MR. SMITHSON: He was the ring leader, Your Honor, is the Government's contention, and I think counsel ought to bear this in mind, too, he has been in trouble in two other institutions, running away and other kinds of fight.

MR. KARR: I understand this and, believe me, I don't underestimate the experience that Mr. Smithson has over the experience that I have in this matter.

THE COURT: I personally think what is going to happen in this case, if I was to prognosticate, that there would be a verdict of guilty of murder in the second degree. However, do not discount a possibility of murder in the first degree.

[208] Let me tell you an experience I had, I guess it was a year and a half ago or two years ago. I forget which assistant it was. I had a murder case, an indictment of murder in the first degree. I thought the evidence of premeditation was very skimpy and very doubtful, much weaker than in this case, and yet just enough to let it go to the jury. But I thought the jury should find the defendant guilty of murder in the second degree, not murder in the first degree, and in my instructions to the jury I talked a lot about murder in the second degree and very little about murder in the first degree. To my discomfort and distress the jury came in and found him guilty of murder in the first degree.

Now, I want to tell you this, I found a way of setting that verdict aside, which I did. I won't find a way here, probably, because Jamison's testimony would convict anybody. Of course, you may contradict it, but if the jury believes Jamison's testimony you are in a bad position.

So the man was retried and he was found guilty of murder in the second degree.

But there is such a thing as runaway trial juries. In the Tatum case, the famous Tatum case, I tried it, I never expected a verdict of guilty with capital punishment. Mr. McLaughlin was counsel for the Government—no, it was not Mr. McLaughlin.

MR. SMITHSON: Mr. Conliff, I believe it was.

[209] THE COURT: Anyway, George Hayes was defense counsel. It was a very brutal rape of a seven-year-old girl. The girl was almost torn in half and was in the hospital for some weeks. There wasn't any doubt about



the man's guilt. Everybody was surprised when the jury came in and said guilty with the death penalty.

You know, in spite of what you read in the Washington Post, Washington juries do not hesitate to bring in a verdict that carries capital punishment. I base this on my observation, the Washington Post to the contrary notwithstanding. We have no trouble getting convictions in murder in the first degree cases.

I know statements have been made to that effect, but that is not true. The fact that the Judicial Conference voted against capital punishment a year ago, that was an audience composed largely of opponents to it and the other side was not well represented. It was not a true vote. If there was a secret ballot by mail of the entire Bar of the District of Columbia capital punishment would be approved overwhelmingly, and more so than a year ago because we have got more homicides.

So, there you are. We will go on with the trial, but I am very much concerned about the advice you have given to your client.

MR. KARR: So am I, so am I.

[210] THE COURT: Just to say so am I does not give me any comfort.

MR. KARR: Your Honor, it doesn't give me any comfort, either. I have to follow the dictates of my conscience.

THE COURT: I think you are immature, Mr. Karr.

MR. KARR: That is entirely possibly.

THE COURT: Why don't you associate an older lawyer with you?

MR. KARR: I had three older lawyers with me at the beginning.

THE COURT: Why don't you talk to Wesley McDonald? I think Wesley McDonald would advise with you without expecting any remuneration.

MR. KARR: Of course. There is no remuneration to give in this case.

THE COURT: Exactly. I am sure Mr. McDonald would unselfishly discuss the matter with you.

MR. KARR: I am certain of this.

THE COURT: You talk to him. However, I am not going to bring the subject up again. We will proceed.

MR. KARR: You Honor, one more thing. While we are at the bench perhaps we could dispose of this. The Defendant Jankowski had under subpoena certain witnesses. These witnesses are James Jopp, Cheesman, and Olson. I understand from the Marshal downstairs that inasmuch as * * *

* * * *

[224] (The last answer was read by the reporter.)

BY MR. KARR:

Q Did he look pretty wild when he was swinging that lamp?

A Yes, sir.

Q Did you get a look at his eyes?

MR. SMITHSON: I object, Your Honor. I think we are going into another issue.

THE COURT: I think this is part of the res gestae. It is within the scope of direct examination.

MR. SMITHSON: I think it's going to a more affirmative position.

THE COURT: Yes, it does, but on the other hand, it is within the scope of the direct examination as to what happened at the time.

MR. SMITHSON: All right.

THE COURT: You may proceed.

MR. KARR: Thank you, Your Honor.

BY MR. KARR:

Q Did he look pretty wild?

A Yes, sir.

Q Did you get a look at his eyes?

A Yes, sir.



Q How did they look?

A I guess you'd call them looking wild. They were [225] real wide.

Q You are talking about Brackett now, aren't you?

A Yes, sir.

Q Did you hear what Mr. Latimer said to Brackett just before Brackett hit him?

A No, sir.

Q You did testify that you heard them saying something, but you couldn't hear it, isn't that correct?

A Yes, sir.

MR. KARR: That is all, Your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. SMITHSON:

Q You say, sir, you were asked on cross-examination where Campbell was sleeping and you responded where he was sleeping or where he was supposed to sleep. Did you see him in a different bed than his normal bed that night?

A Yes, sir.

Q And who was in the bed he normally occupied that night?

A I can't recall, but he was sleeping in the wrong bed.

Q He was in the wrong bed. Did you see him go to the bathroom earlier and come back to his bed?

A Yes, sir.

Q Was his bed occupied at that time?

* * * *

[235] A Yes, sir.

Q These stairs were located, as you look at the desk, these stairs were located to the left of the desk, were they not?

A Yes, sir.

Q Now, a bunch of boys rushed to these stairs after Brackett and McCracken had gone down, didn't they?
A Yes, sir.
Q How many boys would you say?
A I don't know.
Q Were you one of those boys?
A No, sir.
Q Was Jamison one of those boys?
A I don't recall.
Q You were sleeping when this whole thing began, weren't you?
A Yes, sir.
Q And the noise woke you up, didn't it?
A Yes, sir.
Q And when you woke up did you get a clear look at Brackett?
A Yes, sir.
Q What did he look like to you?
A His eyes looked like he was crazy or something.
THE COURT: Like what?

* * * *

[273] Q What did he look like when he was hitting the man over the head with the lamp?
A I think it was as he was going down, something like that.
THE COURT: What was your answer?
THE WITNESS: I think he was going down. He was hollering for help then.

BY MR. KARR:

Q What did Brackett look like when he was hitting the man over the head with the lamp?
A Looked like he was going crazy.
Q He did?
THE COURT: Like what?
THE WITNESS: Like he was going out of his mind.
MR. KARR: That's all, Your Honor, thank you.



## REDIRECT EXAMINATION

BY MR. SMITHSON:

Q Tell me, sir, had you ever been asked a question about how he looked before, at the time he was doing this beating? That is the defendant Brackett.
A No, sir.
Q You have talked to no one about that?
A No, sir.
Q Did you talk to Mr. Goldberg?
A No, sir.

* * * *

**Transcript of Sentencing, March 10, 1961**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 953-60

UNITED STATES

vs

WALTER S. BRACKETT, RICHARD L. MCCRACKEN,
*Defendants.*

Washington, D. C.
March 10, 1961

The above cause came on before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge, for sentencing.

APPEARANCES:

ON BEHALF OF THE GOVERNMENT:

VICTOR CAPUTY, ESQ.
Assistant U. S. Attorney

ON BEHALF OF THE DEFENDANTS:

JOHN W. KARR, ESQ.
MAX N. GOLDBERG, ESQ.
FOSTER WOOD, ESQ.

---

THE DEPUTY CLERK: Walter S. Brackett and Richard McCracken.



THE COURT: The Court will hear counsel for the defendant Brackett.

MR. KARR: Thank you, your Honor. May it please the Court, the only words I have to offer to the Court at this time would be to ask the Court to consider, as I am sure the Court has, the extreme youth of the defendant Brackett. He is currently 15 years of age, and was at the time this very [2] unfortunate crime was committed, he was 14 years of age. I would, therefore, ask your Honor to consider in terms of what might possibly be done with this boy to salvage him both for himself and society, to consider sentencing him under the Youth Corrections Act. This would be all that I would offer, your Honor.

THE COURT: Brackett, is there anything you would like to say before sentence is imposed?

DEFENDANT BRACKETT: No, sir.

THE COURT: The Court will hear counsel for the defendant McCracken.

MR. GOLDBERG: May it please the Court, I respectfully request in this action, this sentencing, a blend of justice and leniency for Richard L. McCracken. He also is a youth. I think the facts will bear out that he did not take a prime part in the case as it finally ended up. He did not take a prime part in the assault of the individual whose life was lost. His age, he is a minor; his mentality, I think that the facts in the psychological testing which he underwent and I think the results of the psychiatric examinations which he underwent will bear out that this boy is of a low average mentality and, as a matter of fact, is a borderline case. I respectfully represent to this Court and respectfully request that this boy's life is blemished by this action and I ask the Court to refer this case to the United States Justice Department—I ask that a recommendation be made to the United [3] States Justice Department, Bureau of Prisons, that the boy be placed under the Youth Correction Act.

THE COURT: The Court does not make a recommendation. You mean that the Court commit him under the Youth Correction Act.

MR. GOLDBERG: Commit him under the Youth Correction Act and that he not be confined in a penitentiary for this crime.

THE COURT: The fact that these defendants are young is not a mitigating circumstance so far as their crime is concerned. They are really murderers. They were allowed to plead guilty to manslaughter, but their acts could have been held by the jury to constitute murder. They were prisoners in the National Training School for Boys, having been committed under the Federal Juvenile Delinquency Act for stealing automobiles. Each of them has a bad record before this present commitment. They were in a dormitory with 80 other prisoners. There was only one guard during the night. He sat inside, immediately inside the dormitory, at a desk. The door of the dormitory was locked. It does seem to me that a guard ought not to be in a locked room with 80 people when he is in no position to call for help. There was not even a push button, there was only a wall telephone.

These two defendants, in conjunction with the third defendant, Jankowski, plotted to overpower the officer, get the keys from him and make an escape during the night. Brackett, [4] though he is the youngest of the three, was the ring leader and he is apparently the most vicious of the three.

By a prearranged signal they got out of their beds and walked to the desk and Brackett grabbed a big heavy brass lamp and began to beat the guard over the head with that lamp and, in addition to that, used a big broom. McCracken, according to the evidence, participated in the beating by hitting the guard with his fist. The guard was screaming and pleading for help but Brackett, particularly, did not let up the beating.



The guard was eventually found on the floor in a pool of blood. He was in a coma for a week and three weeks later he died of this attack.

Now, obviously this is not a case for the Youth Corrections Act, both because of the nature of the offense and the nature of the prior records of these defendants The Court is more interested in the fate that befell the guard than it is in the future of these two boys.

Now, if they have a spark of humanity—and every human being has; some have a greater spark and some a lesser, but everyone has—they will lie awake many a night in a feeling of remorse for what they have done, and if they have any spark of humanity they will spend many an hour on their knees praying to God and imploring God to forgive them.

Now, Brackett has shown vicious tendencies. In addition to plotting the escape plan involved in this case, after he [5] pleaded guilty he tried to escape from the Marshal's van. He needs incarceration in a maximum security institution.

I have already inquired of Brackett whether he has anything to say. McCracken, have you anything to say before sentence is pronounced?

DEFENDANT McCRACKEN: No, sir.

THE COURT: Walter S. Brackett, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than five years and not more than fifteen years. The Court recommends commitment to a Federal institution of the maximum security type.

Richard L. McCracken, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of not less than five years and not more than fifteen years. The Court will make no recommendation as to McCracken because Brackett is the more vicious character.

MR. CAPUTY: If your Honor please, the Government moves to dismiss the remaining counts as to both defendants.

THE COURT: Leave to dismiss is granted.

REPORTER'S CERTIFICATE

I, Gerald Nevitt, certify the foregoing 5 pages constitute the official transcript of the stated proceedings.

/s/ Gerald Nevitt



**Order of the Court of Appeals respecting petitioner's request for writ of mandamus, May 13, 1974**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

No. 74-8027

74-742

---

WALTER STEVE BRACKETT,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

Before: Bastian, Senior Circuit Judge, and Robb, Circuit Judge

ORDER

In consideration of petitioner's motion for leave to file a petition for writ of mandamus in *forma pauperis*, and of petitioner's proffer of photocopies of receipts for certified mail indicating his attempts to file a motion to set aside and vacate judgment of conviction in the District Court, it is

ORDERED by the Court that petitioner's aforesaid motion and lodged petition for writ of mandamus are remanded to the District Court for consideration in the first instance.

The Clerk is directed to transmit a copy of petitioner's pleadings with his other papers to the District Court with a copy of this order.

*Per Curiam*

Hugh E. Kline
Clerk
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ [Illegible]
Deputy Clerk



**Motion to Set Aside and Vacate Judgment of Conviction, May 16, 1974**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-742

WALTER STEVE BRACKETT
Box PMB No. 0-4414-134
Atlanta, Georgia
*Plaintiff*

v.

UNITED STATES OF AMERICA

## MOTION TO SET ASIDE AND VACATE JUDGMENT OF CONVICTION

Now comes the plaintiff Walter Steve Brackett and pursuant to Section 2255, Title 18, moves this Court for an order vacating and setting aside judgment of conviction on March 10, 1961 for the offense of manslaughter.

Plaintiff is now unlawfully confined of his liberty in the United States Penitentiary at Atlanta, Georgia.

Plaintiff says unto the court that his constitutional rights were violated during the trial. Not only did the court lack jurisdiction but the other violations of constitutional rights robbed the court of jurisdiction and therefore it could not proceed to judgment. Plaintiff says among others he now sets forth some of the violations.

1. Plaintiff was only fifteen years of age at the time of the trial and only fourteen years at the time of the alleged offense. Due to the age of the plaintiff there was imposed upon the court the duty and responsibility of indulging every constitutional right in his behalf.

2. The waiver as entered in the records of the Juvenile Court of the District of Columbia did not conform to due process law. See *Kemplen* v. *State of Maryland*, 428 F (2) 169 CCA 4 (1970). This case made fully retroactive.

3. There was ineffective assistance of counsel at plaintiff's trial in that appointed counsel took no interest in the case and failed to advise him of his rights as to appellate procedure. See *United States* v. *DeCoster*, USAppDC 72-1283 decided Oct. 4, 1973. This case of course is fully retroactive.

4. At the conclusion of plaintiff's trial the trial judge failed to sentence the plaintiff under the Youth Corrections Act and in failing to do so did not make an affirmative finding with specific reasons for failure so to do as required by a long line of opinions from the Court of Appeals the latest of which is *United States* v. *Toy*, 482 Fed (2) 741 decided July 13, 1973. Of course this case like the others is fully retroactive.

5. At the time of sentencing the trial judge took into consideration past convictions of plaintiff (although he was a juvenile) when he was not represented by counsel. Of course *United States* v. *Tucker* prevents this, 404 United States 443 (1972). This principle of law was made fully retroactive by the latest Supreme Court ruling in *Berry* v. *City of Cincinnati* decided by the Supreme Court of the United States on November 5, 1972.

6. Statements were elicited from the plaintiff while said plaintiff was subject to the jurisdiction of the juvenile court were used at the trial and said statements were inadmissible. See *Kent* v. *United States*, 383 United States 1045.



7. The Court failed to accord plaintiff due process in connection with his claim of insanity.

8. Section 2255, Title 18 is unconstitutional and in this complaint plaintiff's challenges the constitutionality of this form of post conviction relief—or in any event he challenges the manner in which the courts administer Section 2255.

It will be seen that constitutional questions raised by plaintiff are serious and substantial and it will be readily apparent that with a full plenary evidentiary hearing to which plaintiff is entitled—with plaintiff present—he can support his allegations. In fact, plaintiff says that the government cannot deny or contradict his contentions.

Plaintiff recognizes that it is well understood—although not admitted—that trial courts look with disfavor on post conviction proceedings and try hard to adhere to the concept of finality. It will be conceded that many such proceedings are obviously without merit and the courts have no choice but to deal with them summarily. However, it is another story when it is alleged that the constitutional rights of an accused—as in plaintiff's case—were violated at the trial and the violations are set out one by one then the court must grant an evidentiary hearing. *Kaufman* v. *United States*, 394 United States 217, requires this. In fact, the United States Court of Appeals for the District of Columbia recognized this in *United States* v. *Haywood*, 150 USAppDC 247 (1972) set forth the standards for a hearing. Of concern is the concurring opinion of Judge Wilkey:

> "I concur in Judge Fahy's carefully reasoned opinion and the action the court takes here, not because I am convinced of the wisdom of it but because I feel it is compelled by the Supreme Court's 5-3 decision in *Kaufman* v. *United States* 217."

Plaintiff says it is well stated in *Green* v. *United States*, 158 Fed. Supl. 804:

> "His detailed allegations must be such that if the details were proved and not contradicted a court would be justified in setting aside the sentences."

In fact, the late Judge Prettyman in *Mitchell* v. *United States*, 104 USAppDC 57 said virtually the same thing.

Now as to the merits.

1

Plaintiff was only fifteen years of age at the time of trial and only fourteen years of age at the time of the alleged offense. It will be conceded that due to the age of plaintiff there was imposed upon the court the duty and responsibility of indulging every presumption of the waiver of any constitutional right. Although the trial court was well aware of the age of plaintiff both at the time of trial and at the time of the alleged offense the plaintiff was treated at all times and under all circumstances as an adult. As to the waiver of constitutional rights, see *Patton* v. *United States*, 281 United States 276 and the duty of the court as to waiver:

> "And the duty of the trial court in that regard is not to be discharged as a mere matter of rote but with a sound and advised discretion with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof and with a caution increasing in degree as the offense dealt with increases in gravity."

2

The waiver from Juvenile Court was unconstitutional in that it did not conform to due process of law. There was no hearing in Juvenile Court and plaintiff was without counsel. See *Kent* v. *United States*, 383 U.S. at 541. What was said in *Kemplen* v. *State of Maryland* is particularly appropriate to plaintiff.



> "If the court finds that waiver was inappropriate Kemplen's conviction must be vacated. He may not be tried again because he has served his full adult sentence and is over 21".

It goes without saying that in the matter of waiver plaintiff was entitled to a hearing and to be represented by counsel. This, of course, is a vital constitutional point and would in itself void the conviction and sentence.

3

There was ineffective assistance of counsel within the confines of the very recent opinion of this court in *United States* v. *DeCoster*, 72-1283 decided Oct. 4, 1973. Counsel originally appointed did not even talk with plaintiff. New counsel was appointed and without inquiring of plaintiff as to availability of witnesses and matters of defense through misrepresentation and subterfuge induced plaintiff to enter a plea of guilty to manslaughter. The plea was not voluntary. Of course it could hardly be expected that a lad of 14 could understand the various ramifications of the consequences of a plea of guilty. When counsel informed plaintiff that he had made a deal with the prosecutor and what the prosecutor offered was the best for plaintiff, the plaintiff relied on him. At that time plaintiff believed that said counsel was acting in plaintiff's best interests and plaintiff did not dispute counsel's promises. In truth and in fact counsel was trying to take the easy way out and make a disposition of the case.

4

The trial judge was in error in failing to sentence plaintiff under the Youth Corrections Act and in failing

to do so failed to make an affirmative finding for failing to do so. It is necessary that there must be an affirmative finding but the specific reasons must be set forth. This was plainly set forth in perhaps the most recent case from the Court of Appeals *United States* v. *Toy*, 482 F (2) 741 (1973). See also *United States* v. *Coefield*, 476 F (2) 1157 and *United States* v. *Reed and Hoston*, 476 Fed (2) 1150. In order to show just what is required by the Court of Appeals there is annexed hereto as Exhibit A. This involves correspondence between Judge Gesell of this court and the corrections officer of the District of Columbia and a number of questions are propounded. All of the above demonstrates that the trial judge in plaintiff's case not only disregarded the plain language of the Youth Corrections Act but failed to set forth the reasons for failing to do so.

5

At the time of sentencing the trial judge took into consideration past convictions of plaintiff even though he was a juvenile and was not represented by counsel. This cannot be done under *United States* v. *Tucker*, 404 United States 443 (1972). By this ruling a trial judge during the sentencing process cannot take into consideration any prior convictions when the accused was not represented by counsel. *United States* v. *Tucker* was reinforced by *Argersinger* v. *Hamlin*, 407 United States 25 and Argersinger was made fully retroactive by the very recent case of *Berry* v. *City of Cincinnati* decided by the Supreme Court of the United States on November 5, 1973. See also the recent case of *Brown* v. *United States of of America*, CCA 4 decided August 1, 1973 (72-1312). See also the frequently cited case of *Lipscomb* v. *Clark*, 468 F (2) 1321 CCA 5 (1972). This principle of law is fully retroactive.



6

Statements were elicited from the plaintiff while plaintiff was subject to the jurisdiction of the Juvenile Court and used against him. He was not advised of his constitutional rights nor was he told that he was not required to make any statement. However, he was interrogated relentlessly. All of this violated his constitutional rights. See *Kent* v. *United States*, 383 United States 1045.

7

The trial court ignored plaintiff's plea of insanity.

Plaintiff's contention was that he was of unsound mind at the time of the alleged offense. Considering the age of plaintiff that put the court on notice that this defense should have been carefully explored in accordance with due process of law. Three psychiatrists examined him at plaintiff's request and testified that he was of unsound mind at the time of the alleged offense. The record will show that the court thereupon appointed three psychiatrists to examine him at the D.C. Jail but could not say that he was or was not insane at the time of the alleged offense. The court did not follow through based on this inconclusive testimony.

A motion was made by plaintiff that he be sent to St. Elizabeth's Hospital for complete observation and evaluation to determine his mental status. This request was denied. Of course this was a violation of plaintiff's constitutional rights. See *Bush* v. *State of Texas*, 372 United States 586 (1963). Plaintiff's case is far more compelling than the case of Bush who was 64 years of age.

8

Plaintiff contends that Section 2255, Title 18, is unconstitutional. It will be recognized that when the Congress enacted Section 2255 it had in mind liberalizing the

writ of habeas corpus—making it more accessible to one deprived of his liberty through violation of his constitutional rights. It has had the opposite effect. Had plaintiff been permitted to proceed by habeas corpus he would have had an evidentiary hearing many years ago. The government would have had to respond and make answer within 13 days at the latest and then there would have been a hearing and plaintiff would have been able to testify as to the violation of his constitutional rights and the court would have to release him—or award a new trial—if he supported his contentions which plaintiff could have done. Now what happens under Section 2255. It is treated as a civil action and the government is allowed 60 days to answer. Invariably the government gets additional time. The plaintiff is then given an opportunity to file an additional pleading. It then goes on the civil calendar to await its call for trial. Thus months and years can go by without a hearing—no matter how vital the points raised. This practice amounts to a virtual suspension of the writ of habeas corpus. There is then a virtual escape clause since the case goes back to the same judge. He can get around it by saying "the files and records conclusively show that the plaintiff is entitled to no relief." It is a rare judge indeed who will admit he made a mistake. Even if Section 2255 is utilized the matter should not go back to the same judge. These matters should go to another judge. It is well stated in *Halliday* v. *United States*, 380 Fed (2), 279 CCA 1 (1967):

> "In any event as unpleasant as it might be for a judge to testify we consider it far worse that he should be the trier of fact to determine his own credibility."

It seems strange indeed that the matter of the virtual suspension of the writ of habeas corpus in 2255 proceedings has never been passed upon by the Supreme Court.



Since plaintiff now challenges the constitutionality of Section 2255 his case may be the one for the Supreme Court to rule on this important question. As a matter of fact the Ninth Circuit in *Hayman* v. *United States*, 187 Fed (2) 456 (1951) seemed to pave the way for a constitutional test. It held 2255 unconstitutional but the Supreme Court dodged the constitutional point by reversing on other grounds. This is indeed a vital issue and has not been given the proper attention by text book writers and law school periodicals. The matter has got to be resolved—but when? *Sanders* v. *United States*, 373 United States, 1, said that in a 2255 proceeding the Congress intended to provide a remedy *exactly commensurate with that which had been available by habeas corpus.* In 59 *Yale Law Review* 1183 (1960) in dealing with the inadequacy of Section 2255:

> "if the motion is to replace habeas corpus in any given case it must provide an equivalent remedy . . . ."

In *Glynn* v. *Donnelly*, 470 Fed (2) 95 CCA 1 (1972) the court said:

> "Habeas corpus procedure is set out in 28 U.S.C. 2243. That section sets time limits for issuance of show cause orders and for holding hearings and in general manifests a policy that although civil in nature habeas corpus petitions are to be handled promptly."

Since plaintiff in this proceeding challenges the constitutionality of Section 2255 as virtually suspending the writ of habeas corpus it is to be hoped that the court will rule promptly on this contention.

• • • •

Plaintiff expresses the hope that this court will rule expeditiously on his complaint. Plaintiff ventures the prediction if this complaint is immediately given to the

Solicitor General of the United States he will cut through the red tape and order plaintiff's immediate relief.

Plaintiff has not the slightest doubt that he has fully met the criteria set forth in *Green* v. *United States*, supra:

> "His detailed allegations must be such that if the details were proved and not contradicted a court would be justified in setting aside the sentences."

It must not be overlooked that *United States* v. *Lookretis*, 398 Fed (2) 64 is authority for the proposition that once a constitutional infraction has been shown the government must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict complained of.

Judge Weinfeld of the United States District Court for the Southern District of New York has stated the matter well:

> "One imprisoned under a void judgment is just as properly deprived of his liberty as the most innocent person. Further the law presumes innocence until a valid judgment of conviction is entered. A judgment void ab initio does not become vitalized by mere passage of time and if void when entered is void for all time."

As to the claim of finality so often interposed by prosecuting and judicial officers, it is well to keep in mind the words of Chief Justice Burger when he sat on the Court of Appeals in *Bostic* v. *United States*, 293 Fed (2) 681:

> "I agree that the passage of time whether five years or twenty-five years cannot affect a valid claim under Section 2255. That is what Congress intended and that is what it should be."

One must never be condemned for utilizing every legal device available to erase an unlawful conviction. Let us



take the case of Judge Kerner, Circuit Judge of the Seventh Circuit. He is fighting his convictions to the hilt and still drawing his salary. One can easily suppose th the former Vice President—if he did not burn his bridges behind him by pleading guilty—would have fought to the limit. Then again, Justice Fortas of the Supreme Court, who was permitted to resign to escape prosecution for bribery, would have used every maneuver at his command had he been indicted.

Respectfully submitted,

WALTER STEVE BRACKETT
Box P.M.B., No. 0-4414-134
Atlanta, Georgia 30315

**Opposition to Motion to Set Aside and Vacate Judgment of Conviction, August 6, 1974**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-742

(Criminal No. 953-60)

---

WALTER STEVE BRACKETT,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## OPPOSITION TO MOTIONS TO SET ASIDE AND VACATE JUDGMENT OF CONVICTION

Comes now the United States, by its attorney, the United States Attorney for the District of Columbia, and in opposition to the motion to vacate sentence pursuant to 28 U.S.C. § 2255, filed May 16, 1974 represents to the Court the following:

1. In September 1960 petitioner was a resident of the National Training School for Boys of the District of Columbia, having been committed there as a delinquent by the Juvenile Court of the District of Columbia. On September 11, 1960, William Lattimer, an officer at the Training School was killed in an escape attempt from the institution by petitioner and two other boys committed there. The escape attempt being unsuccessful, petitioner remained in custody at the Training School, now pursuant to homicide charges. On October 19, 1960, jurisdiction over petitioner and two co-defendants (with



respect to this offense) was waived by the Juvenile Court of the District of Columbia.[1] An indictment was then returned against petitioner and his two co-defendants on November 7, 1960, in the United States District Court for the District of Columbia (Criminal Case Number 953-60) on first degree murder (D.C. Code § 22-2401 (1951)) and murder of an officer and employee of the United States (18 U.S.C. § 1114). Petitioner entered an initial plea of not guilty to these charges.

It appears[2] petitioner was given a mental examination at the request of his attorney by Dr. Sol Charen on November 28, 1960. Upon government's subsequent motion for mental examination (for purposes of both the issues of competency and the insanity defense), such an examination was ordered by the court on January 13, 1961.[3] The result of this examination showed that petitioner was competent to stand trial and that the commission of the offense had been a product of his "psychological makeup".[4]

Trial in petitioner's and his two co-defendants' case began on January 30, 1961. Selection of a jury and opening statements by the government and petitioner's

---

[1] Petitioner was 14 at the time of the offense and was 15 at the time of trial.

[2] This representation appears as an allegation in the government's motion for a mental examination of petitioner dated December 19, 1960.

[3] Petitioner filed a written opposition to this motion on December 21, 1960.

[4] Initially the court ordered examination resulted only in a report that petitioner was competent to stand trial, an allegation which petitioner and his counsel had already asserted in opposition to the government's motion for the mental examination. Upon the court's further direction that the examining psychiatrist form an opinion as to petitioner's mental state at the time of the offense, it was the doctor's opinion that the "offense grew out of the patient's underlying psychological makeup. . .".

counsel were completed on the first day. On the second day of trial, January 31, 1961, prior to the jury's entering the courtroom, petitioner's two co-defendants withdrew their previous pleas of not guilty and entered pleas of guilty to voluntary manslaughter.[5] These pleas were accepted by the court and trial continued as to the petitioner. The evidence produced by the government on that second day of trial was directed to showing the fact of death and expert testimony as to the cause of death. The prosecution also called three of the boys from the Training School [6] who testified as eyewitnesses to petitioner's attack and beating of the guard which eventually led to the guard's death. Further government testimony from officers at the Training School was directed to the apprehension of petitioner upon the failure of the escape attempt.[7] Trial was adjourned for the day upon completion of this testimony.

At the beginning of the third day of the trial, petitioner withdrew his plea of not guilty and entered a plea of guilty to voluntary manslaughter. This plea was accepted by the court upon petitioner's notification of his rights [8] and his waiver of them.

---

[5] In entering his plea, one of the co-defendants offered to testify as a government witness as against petitioner.

[6] These three witnesses had not been involved in the escape attempt.

[7] The prosecutor specifically indicated to the court that he would not bring out testimony regarding any statements made by petitioner during this period. (Trial Transcript, hereinafter "Tr.", at 258-59.) The record reflects that there was no testimony regarding any statements.

[8] Defense counsel represented to the court that the petitioner had been fully advised of his rights and that he voluntarily desired to enter his plea. Additionally, the court expressly informed the petitioner that he was under no obligation to enter the plea and that he had the right to continue the trial and have a jury decide the case.



On March 10, 1961, petitioner came before the court for sentencing. Although petitioner's counsel specifically argued to the court for the imposition of a Youth Corrections Act sentence (S. Tr. at 2 [9]), the court specifically rejected such a sentencing alternative and instead sentenced petitioner as an adult to a term of five to fifteen years imprisonment.[10]

On December 10, 1969, petitioner filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255 in this court (Civil Action Number 3497-69). Petitioner alleged the court had no jurisdiction to accept his guilty plea because he was a juvenile and that the trial court failed to proceed properly with respect to his insanity defense. This court appointed counsel to represent petitioner. Since the appointment of counsel over four years ago no further action has been taken upon that case.

Petitioner is presently incarcerated in the Federal Penitentiary, Atlanta, Georgia.

2. In the present action, petitioner challenges the validity of his conviction. Specifically, petitioner alleges: (1) that the waiver of jurisdiction from the Juvenile Court in his case failed to afford him due process of law; (2) that he received ineffective assistance from his trial counsel in that petitioner was not informed of his rights to take an appeal; (3) that the sentencing judge failed

---

[9] "S. Tr." refers to the transcript of petitioner's sentencing on March 10, 1961.

[10] Petitioner was paroled from this sentence on August 1, 1967. He was then returned to federal custody as a parole violator on October 9, 1970, pursuant to two convictions in the state court in Montgomery, Alabama for forgery. Petitioner had received sentences of 13 to 15 months on each of these convictions. Petitioner was again paroled on May 15, 1972, but was again returned to federal custody as a parole violator on June 1, 1973, pursuant to conviction of possession of stolen property in the state court in Greenville, South Carolina. Petitioner received a sentence of ten years pursuant to this conviction.

to sentence him under the Youth Corrections Act and failed to state specific reasons for not doing so; (4) that in sentencing, the court took into consideration past convictions of petitioner when he was not represented by counsel; (5) that statements elicited from petitioner while he was subject to the jurisdiction of the Juvenile Court were used at his trial and were inadmissible; (6) that the court failed to accord petitioner due process with respect to his claim of insanity; and (7) that 28 U.S.C. § 2255 is an unconstitutional suspension of the writ of habeas corpus.

3. In response to petitioner's claim that the waiver of jurisdiction from the Juvenile Court did not comply with due process, respondent submits petitioner is entitled to no relief. Petitioner relies on *Kent* v. *United States*, 383 U.S. 541 (1966) (waiver of juvenile court jurisdiction valid only if hearing and counsel provided) and *Kemplen* v. *Maryland*, 428 F.2d 169 (4th Cir. 1970) (*Kent* applied retroactively). Respondents submit that the *Kent* requirements do not apply to waiver of jurisdiction in petitioner's case since it occurred five years prior to the *Kent* decision. Although *Kent* has been made retroactive by the Fourth Circuit as petitioner indicates, the rule in this circuit is clear that *Kent* is not to be applied retroactively. *Mordecai* v. *United States*, 137 U.S. App. D.C. 189, 195, 421 F.2d 1133, 1139 (1969), *cert. denied*, 397 U.S. 977 (1970).

4. With respect to petitioner's claim that he received ineffective assistance from his trial counsel inasmuch as he was not informed of a right to appeal, respondent submits that since petitioner entered a guilty plea he waived any rights to appeal and hence is entitled to no relief on this allegation. Petitioner alleges also that he relied on counsel's advice to enter a guilty plea but now claims he was induced to do so through "misrepresentation and subterfuge." No facts are alleged in support



of this claim. Respondent submits that without indicating more specifically how he was misled or prejudiced, these allegations must be considered insufficient as stating any grounds for relief. *Sanders* v. *United States*, 373 U.S. 1, 19 (1963); *Torres* v. *United States*, 469 F.2d 651 (9th Cir. 1972); *United States* v. *Lowe*, 367 F.2d 44 (7th Cir. 1966); *Martinez* v. *United States*, 299 F.2d 254 (6th Cir.), *cert. denied*, 371 U.S. 863 (1962); *Wilkins* v. *United States*, 103 U.S. App. D.C. 322, 258 F.2d 416 *cert. denied*, 357 U.S. 942 (1958).

5. Respondent submits that petitioner is entitled to no relief on his claim that sentencing was improper with respect to the consideration of the Youth Corrections Act and the failure to state reasons why petitioner was not sentenced thereunder. The recent opinion of the Supreme Court in *Dorszynski* v. *United States*, —— U.S. ——, No. 73-5284, decided June 26, 1974, is dispositive of petitioner's contention.[11] *Dorszynski* clearly indicates that a court need not state the reasons why it does not sentence pursuant to the Youth Corrections Act in a particular case.

6. With respect to petitioner's claims regarding the sentencing judge's taking into consideration past con-

---

[11] Even before *Dorszynski*, respondent submits that petitioner's reliance on *United States* v. *Coefield*, 155 U.S. App. D.C. 205, 476 F.2d 1152 (1973) is misplaced. Petitioner's sentencing occurred twelve years prior to the holding of *Coefield*. No authority has been cited that the *Coefield* rule is to be given retroactive effect. Finally, respondent submits that in view of petitioner's present age, 28 no relief by way of the Youth Corrections Act is now available to him. In a similar case dealing with the potential application of a Youth Corrections Act sentence to a petitioner who was no longer a juvenile, the court in *Mordecai* v. *United States*, 137 U.S. App. D.C. 189, 421 F.2d 1133 (1969), *cert. denied*, 397 U.S. 977 (1970) (Bazelon, C.J.) noted:

> "Even if nonpunitive rehabilitation in the juvenile process would have been the proper path in 1961, society can no longer offer what was then, rightly or wrongly, denied." 137 U.S. App. D.C. at 194, 421 F.2d at 1138.

victions of petitioner when he was not represented by counsel and claims that statements made by petitioner while in the jurisdiction of the Juvenile Court were inadmissible, respondent submits that petitioner is entitled to no relief. Without indicating more specifically what prior convictions or what statements or under what circumstances they were made, these allegations must be considered insufficient as stating any grounds for relief. *Sanders* v. *United States*, 373 U.S. 1, 19 (1963); *Torres* v. *United States*, 469 F.2d 651 (9th Cir. 1972); *United States* v. *Lowe*, 367 F.2d 44 (7th Cir. 1966); *Martinez* v. *United States*, 299 F.2d 254 (6th Cir.), *cert. denied*, 371 U.S. 863 (1962); *Wilkins* v. *United States*, 103 U.S. App. D.C. 322, 258 F.2d 416, *cert. denied*, 357 U.S. 942 (1958). Moreover, it is noted that with respect to the claim of inadmissible statements, by entering a guilty plea, petitioner waived the right to challenge these alleged infirmities. Finally, as noted in the earlier statement of facts, the prosecution carefully avoided bringing into evidence any statements which might have been made by petitioner. (Tr. at 258-59).

7. In response to petitioner's claim that he was not accorded due process with respect to his insanity claim, respondent submits that since petitioner entered a plea of guilty during the presentation of the prosecution's case in chief. Consequently, the issue of an insanity defense was never before the court. Petitioner further alleges that the court denied his motion to be sent to Saint Elizabeths Hospital for observation and evaluation of his mental status. Respondent submits that the record shows no indication that any such motion was ever made. To the contrary, the record reflects that petitioner alleged he was competent to stand trial and that he opposed the government's motion for observation and evaluation of his mental state.



8. Petitioner's final contention is that 28 U.S.C. § 2255 is an unconstitutional suspension of the writ of habeas corpus.[12] The weight of authority clearly indicates § 2255 suffers no such constitutional infirmity. *Cantu* v. *Markley*, 353 F.2d 696 (7th Cir. 1965); *Stirone* v. *Markley*, 345 F.2d 473 (7th Cir.), *cert. denied*, 282 U.S. 829 (1965); *Madigan* v. *Wells*, 224 F.2d 577 (9th Cir.), *cert. denied*, 351 U.S. 911 (1955), *United States* v. *Anselai*, 207 F.2d 312 (3d Cir.); *cert. denied*, 347 U.S. 902 (1953); *Close* v. *United States*, 398 F.2d 144 (4th Cir.), *cert. denied*, 344 U.S. 879 (1952); *St. Clair* v. *Hiatt*, 83 F. Supp. 585 (D.C. Ga.), *aff'd*, 177 F.2d 374 (1949).

WHEREFORE, it is respectfully submitted that the motion to vacate be denied on the ground that the motion, files and records in this case conclusively show that petitioner is entitled to no relief.

/s/ Earl J. Silbert
EARL J. SILBERT
United States Attorney

/s/ Oscar Altshuler
OSCAR ALTSHULER
Assistant United States Attorney
4267036

---

[12] Respondent notes the logical inconsistency posed by a challenge to the constitutionality of § 2255 in a motion made pursuant to that section. *Close* v. *United States*, 198 F.2d 144 (4th Cir.), *cert. denied*, 344 U.S. 879 (1952).

**Order of the District Court denying petitioner's request to proceed *in forma pauperis*, August 29, 1974**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-742

Criminal No. 953-60

WALTER STEVE BRACKETT

vs

UNITED STATES OF AMERICA

ORDER

This matter is before the Court on petitioner's Notice of Appeal from this Court's Order of August 5, 1974, denying petitioner's § 2255 petition. Pursuant to Rule 24 of the Federal Rules of Appellate Procedure, this Court will not certify that this appeal is taken in good faith. Subsequently, this Court similarly denies the petitioner the right to proceed in *forma pauperis*.

Petitioner raised several issues in his § 2255 Motion, each of which the respondent replied to fully and amply. (See Respondent's Opposition. . . . at 5-9). The Court will not repeat each allegation, but adopts the responses filed by respondent.

Additionally, the Court notes that petitioner continues to serve time on *this* criminal conviction merely because he has twice violated his parole. Petitioner was sentenced to 5-15 years on March 10, 1961, after having entered a plea of guilty to voluntary manslaughter. Thereafter, petitioner was paroled from the sentence at issue on August 1, 1967. He was returned to federal custody as a



parole violator on October 9, 1970, pursuant to two state court convictions for forgery. Petitioner received 13-15 months on each of these convictions. Petitioner was reparoled May 15, 1972, but was again returned as a parole violator on June 1, 1973, pursuant to a state court conviction for possession of stolen property. His sentence for this conviction was 10 years.

It appears to this Court that allowing petitioner to proceed on appeal in *forma pauperis* would be a gross waste of judicial time and taxpayer money. Petitioner has presented absolutely no issue which would merit further review. Furthermore, even if (and this Court is confident it could never happen) petitioner could advance an argument with merit, it would make no difference. Petitioner is serving a 10 year sentence independent of any action taken by this Court.

For the foregoing reasons, it is by the Court this 28th day of August 1974,

ORDERED that petitioner's Motion to Proceed in *Forma Pauperis* should be and hereby is denied.

/s/ June L. Green
JUNE L. GREEN
U. S. District Judge

No. 77-763

# In the Supreme Court of the United States

OCTOBER TERM, 1977

WALTER S. BRACKETT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

**WADE H. McCREE, Jr.,**
*Solicitor General,*
**BENJAMIN R. CIVILETTI,**
*Assistant Attorney General,*
**SIDNEY M. GLAZER,**
**LOUIS M. FISCHER,**
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# INDEX



## CITATIONS





237-463—78——1

# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-763

WALTER S. BRACKETT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The judgment order of the panel of the court of appeals (Pet. App. 21) is not reported. The opinion of the court of appeals on rehearing *en banc* (Pet. App. 1–19) is reported at 567 F. 2d 501.

### JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975, and was affirmed on rehearing *en banc* on July 18, 1977. The Chief Justice extended the time for filing a petition for a writ of certiorari to November 28, 1977, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether this Court's decision in *Kent* v. *United States,* 383 U.S. 541, should be applied retroactively.

2. Whether this Court's decision in *Dorszynski* v. *United States,* 418 U.S. 424, should be applied retroactively.

3. Whether petitioner's claim that the sentencing court improperly took into consideration prior convictions was presented with sufficient specificity to require the district court to hold an evidentiary hearing.

**STATEMENT**

On November 7, 1960, petitioner was indicted for first degree murder in connection with an assault that caused the death of a guard at the National Training School for Boys (Pet. App. 2). At the time, he had been convicted on at least three previous occasions, twice in state courts and once in federal court (Pet. C.A. Brief 42–43, n. 17). In the course of his murder trial before the Honorable Alexander Holtzoff, in the District Court for the District of Columbia, petitioner pleaded guilty to the lesser offense of manslaughter. Judge Holtzoff subsequently sentenced petitioner, who was then fifteen years old, to a term of five to fifteen years' imprisonment (Pet. App. 2-3).

Petitioner was twice paroled, and his parole was twice revoked for commission of subsequent criminal offenses. After his third release on parole, petitioner



was again convicted on state charges, and he is now serving a state sentence. Because of his history of parole violations, petitioner still has a significant portion of his 1961 sentence left to serve (Pet. 8 n. 4).

In 1969, petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence. After allowing that motion to lay dormant for several years, petitioner renewed it in 1974 (Pet. App. 47–57). The district court denied the motion without a hearing (Pet. App. 20), and the court of appeals affirmed by order (Pet. App. 21). Following rehearing *en banc* on the issue of the retroactivity of this Court's opinion in *Dorszynski* v. *United States,* 418 U.S. 424, the court of appeals again affirmed (Pet. App. 1–19).

**ARGUMENT**

1. Petitioner argues (Pet. 13–19) that he is entitled to the retroactive application of this Court's decision in *Kent* v. *United States,* 383 U.S. 541. In that case, this Court held that a juvenile was entitled to notice, a hearing, and assistance of counsel before the juvenile court for the District of Columbia could waive its jurisdiction. Petitioner apparently seeks to have his case remanded so that a new waiver hearing may be held (Pet. 19), although he is now 32 years old (Pet. 5 n.1) and therefore outside the jurisdiction of the juvenile court. Petitioner points to a split among the circuits and state courts in urging review. We submit that the holding in *Kent* should not be applied retroactively, and that in light of the diminishing importance of the question, there is no need for review by this Court.

We note at the outset that by pleading guilty in the adult court, petitioner waived his claim that his juvenile waiver hearing did not meet statutory or constitutional standards. See *Smith* v. *Yeager,* 459 F. 2d 124 (C.A. 3); *Wilhite* v. *United States,* 281 F. 2d 642, 644 (C.A.D.C.) (Burger, J.); *cf. Tollett* v. *Henderson,* 411 U.S. 258; *Brown* v. *Cox,* 481 F. 2d 622, 628 n.16 (C.A. 4) (*en banc*), certiorari denied, 414 U.S. 1136.

In any event, *Kent* should not be given retroactive effect. Whether a ruling of this Court in a criminal case is made retroactive turns on (1) the purpose of the new rule, (2) the extent of the reliance by the courts or other authorities on the old rule, and (3) the effect of retroactive application on the administration of justice. See, *e.g., Michigan* v. *Payne,* 412 U.S. 47; *Stovall* v. *Denno,* 388 U.S. 293. In particular, the Court has focused on whether the *major* purpose of the new rule is " 'to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials.' " *Hankerson* v. *North Carolina,* 432 U.S. 233, 243 (emphasis in original); *United States* v. *Peltier,* 422 U.S. 531, 535; *Williams* v. *United States,* 401 U.S. 646, 653.

The rule announced in *Kent* was not intended to contribute to the accuracy of the truth-finding process, nor did it correct a practice that raised serious questions about the accuracy of guilty verdicts in prior cases. Instead, *Kent* merely established that the waiver hearing was a sufficiently important stage of



the criminal process to require certain procedural protections, even though it did not in any way affect the determination of guilt or innocence. As the Ninth Circuit stated in *Harris* v. *Procunier,* 498 F. 2d 576, 579:

> First, a certification hearing is not a trial, but a hearing. Juvenile proceedings are not intended to be adversarial. Second, the function of a certification hearing is not to gather facts for the purpose of conducting criminal proceedings against the juvenile, but to determine whether it would be proper for the juvenile court to continue to assert jurisdiction over the juvenile. While we in no way discount the thrust of *Kent* to provide due process guarantees at the certification hearing, we do not see that it is the type of constitutional rule which is directed at, or in any way impairs, the truth-finding function.

See also *Brown* v. *Wainwright,* 537 F. 2d 154, 156–157 (C.A. 5), certiorari denied, 430 U.S. 970.

Petitioner seeks support for his contention in *McConnell* v. *Rhay,* 393 U.S. 2, and *Arsenault* v. *Massachusetts,* 393 U.S. 5, in which this Court held retroactive the right to counsel at arraignments at which pleas are entered and defenses may be waived, and at deferred sentencing proceedings. Both of these settings, however, are unlike a juvenile waiver hearing in that they directly involve questions going to guilt or innocence. An uncounseled plea or waiver of an affirmative defense may result in the conviction of a defendant otherwise legally entitled to a verdict of not guilty. And in the deferred sentencing procedure,

as the Court pointed out in *Mempa* v. *Rhay,* 389 U.S. 128, 136–137, the defendant's continued liberty often turns on a factual determination of guilt or innocence of subsequent, uncharged criminal conduct. The juvenile waiver hearing, by contrast, does not involve a determination of guilt or innocence, but merely resolves whether the juvenile or adult system will make that determination.

The retroactivity question here is therefore much more like that presented in *Adams* v. *Illinois,* 405 U.S. 278, than that presented in the cases relied on by petitioner. In *Adams,* this Court held that even though a preliminary hearing is a "critical stage of the criminal process" at which the defendant is constitutionally entitled to counsel, see *Coleman* v. *Alabama,* 399 U.S. 1, that rule would not be applied retroactively because the purposes of the rule did not bear sufficiently on the factfinding process at trial. 405 U.S. at 281. Because the juvenile waiver hearing is similarly unrelated to the truth-finding process, the rights established by *Kent* should not be held retroactive.

Petitioner is correct that there is a split in the circuits on this issue, but the split is of diminishing importance and does not require resolution by this court. The Fourth Circuit early held *Kent* retroactive, *Kemplen* v. *Maryland,* 428 F. 2d 169, but every other circuit that has considered the question has ruled that *Kent* should not be given retroactive effect, and this Court has denied certiorari on each



occasion.[1] Even the Fourth Circuit has significantly retreated from its original position on the matter. *Brown* v. *Cox,* 481 2d 622 (C.A. 4) (*en banc*), certiorari denied, 414 U.S. 1136. There is no need for review by this Court now.

Several additional factors present in this case cut against applying *Kent* retroactively here. First, petitioner's offense was so serious and his lack of amenability to the juvenile correctional process so clearly apparent that it may be said with confidence that a juvenile waiver hearing with full *Kent* procedural protections would not have produced a different result. Petitioner was indicted for first degree murder (Pet. 5), and the sentencing court described the offense as particularly gruesome (Pet. App. 29; Tr. 201). A remand under these circumstances would therefore be meaningless. *Brown* v. *Wainwright, supra,* 537 F. 2d at 157–158; *Harris* v. *Procunier, supra,* 498 F. 2d at 579; *Brown* v. *Cox, supra,* 481 F. 2d at 627–628; *Mordecai* v. *United States, supra,* 421 F. 2d at 1138.

Second, the retroactive application of *Kent* in this and other similar cases would have an adverse effect on the administration of justice. Petitioner is now 32 years

[1] See *Mordecai* v. *United States,* 421 F. 2d 1133 (C.A.D.C.), certiorari denied, 397 U.S. 977; *Harris* v. *Procunier,* 498 F. 2d 576 (C.A. 9) (*en banc*), certiorari denied, 419 U.S. 970; *Brown* v. *Wainwright,* 537 F. 2d 154 (C.A. 5), certiorari denied, 430 U.S. 970. See also, *Smith* v. *Yeager,* 459 F. 2d 124, 127 (C.A. 3) (suggesting that full retroactivity for *Kent* would be inappropriate).

257-463—78——2

old and beyond the jurisdiction of the juvenile court. Not only would a waiver hearing be difficult to reconstruct, but assuming that it is found that waiver should not have been granted, the remedy petitioner seeks is full release. Although such a remedy was contemplated as a possible result in *Kent* itself, it should not automatically be applied in cases in which the juvenile waiver preceded the announcement of the rule in *Kent*. Yet assuming that full release is not the proper course, there is no real remedy available to petitioner at this point. As the Fifth Circuit in *Brown* v. *Wainwright* correctly noted (537 F. 2d at 157):

> [I]f we should determine that the juvenile court judge's decision to waive jurisdiction was improper, we have no appropriate remedy to grant Brown. Obviously, the juvenile court cannot now take over Brown's case, in that it no longer possesses jurisdiction over him and its attempts to now offer "non-punitive" rehabilition to a 27 year old man who has been in prison for twelve years and who has three more sentences to serve would be ludicrous.

See also *Harris* v. *Procunier, supra,* 498 F. 2d at 579; *Mordecai* v. *United States, supra,* 421 F. 2d at 1138.

Finally, petitioner's claim arises on a collateral challenge to his conviction, which further militates against applying *Kent* retroactively here. See *Hankerson* v. *North Carolina, supra,* 432 U.S. at 264–248 (Powell, J., concurring in the judgment); *Mackey* v. *United States,* 401 U.S. 667, 675–702 (Harlan, J.); *Williams* v. *United States,* 401 U.S. 646, 665–666 (Marshall J., concurring in part and dissenting in part).



2. For many of the same reasons, there is no merit to petitioner's claim that this Court's decision in *Dorszynski* v. *United States,* 418 U.S. 424, should be given retroactive application here.

In *Dorszynski,* this Court held that it would require district courts, in electing not to sentence under the Youth Corrections Act, to make an explicit finding that the defendant would not benefit from youth offender treatment. The Court made it clear that the Youth Corrections Act was not intended to limit the district court's sentencing discretion or to confer a substantive right on the youth offender to particular sentencing treatment. The only purpose of requiring an explicit finding of "no benefit," the Court held, was to relieve the appellate courts from having to determine from the record in each case whether an implicit finding of no benefit had been made and thus whether the district court had been aware of and had actually exercised its discretion in electing not to sentence under the Youth Corrections Act. 418 U.S. at 443–444. See also *Owens* v. *United States,* 383 F. Supp. 780, 785–787 (M.D. Pa.), affirmed, 515 F. 2d 507 (C.A. 3), certiorari denied, 423 U.S. 996. The rule announced in *Dorszynski* thus does not even remotely contribute to the accuracy of the fact-finding process or serve to "overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Williams* v. *United States, supra,* 401 U.S. at 653. Instead, it merely facilitates the very narrow appellate inquiry as to

whether the district court has exercised its discretion in sentencing the youthful offender.

In this case, because the court of appeals found that the district judge had not made an explicit finding of no benefit, it examined the record and concluded that an implicit finding had been made. The district court was thus found to have properly exercised its statutory discretion under the Youth Corrections Act; all that the court of appeals found missing was the explicit finding that would have made the appellate court's job easier. To contend that a defendant enjoys a right to a more explicit finding than was made here, and that the right to that finding should be applied retroactively on collateral attack to invalidate his sentence, is to read much more into *Dorszynski* than is there. See *Jackson* v. *United States,* 510 F. 2d 1335, 1337 (C.A. 10).

We submit, initially, that the sentencing court's explicit reference to the Youth Corrections Act and its express finding that sentencing under that Act was inappropriate would be sufficient to satisfy the requirements of *Dorszynski,* even if that case were held to apply retroactively. In *Dorszynski,* the Court stated (418 U.S. at 444):

> Literal compliance with the Act can be satisfied by any expression that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act.

At sentencing, counsel for petitioner specifically requested that the court sentence under the Youth



Corrections Act (Pet. App. 41), and the court specifically declined to do so (Pet. App. 43), noting that petitioner "needs incarceration in a maximum security institution" (Pet. App. 43). While it doubtless would have been preferable for the sentencing court to have used the precise terms of the statute in exercising its sentencing discretion, the incantation of the statutory formula is not required by *Dorszynski.* See *United States* v. *Silla,* 555 F. 2d 703, 707–708 (C.A. 9); *McKnabb* v. *United States,* 551 F. 2d 101, 105 (C.A. 6); *United States* v. *Scruggs,* 538 F. 2d 214 (C.A. 8). In *Dorszynski,* the Court vacated the sentence because it was unclear from the record whether the sentencing court realized the defendant was eligible for sentencing as a youth offender. Here, by contrast, the record makes it clear beyond cavil that the court realized it had the choice and deliberately chose to sentence petitioner as an adult.

Even if the sentencing court's findings were not sufficient to satisfy the "explicit finding" requirement of *Dorszynski,* that should not be grounds for vacating petitioner's 1961 sentence. The disparity between what *Dorszynski* requires—even giving that case its most generous construction—and what was done here is so minimal as to call for application of the principles of harmless error. Moreover, while there is, as petitioner contends, a technical split in the circuits on the question of the retroactivity of *Dorszynski,* the split is not as sharp as petitioner suggests, and the matter is not of sufficient importance to require resolution by this Court.

Petitioner relies on decisions by the Fourth, Fifth, and Eighth Circuits giving *Dorszynski* retroactive effect.[2] The Fourth and Fifth Circuits, however, have applied *Dorszynski* retroactively without any analysis of the issue. See *McCray* v. *United States,* 542 F. 2d 1246 (C.A. 4); *Robinson* v. *United States,* 536 F. 2d 1109 (C.A. 5); *Hoyt* v. *United States,* 502 F. 2d 562 (C.A. 5).

Of the three courts that have applied *Dorszynski* retroactively, only the Eighth Circuit has discussed the issue, and that court has required only a very limited inquiry on the part of the sentencing judge in response to a collateral attack on a sentence for failure to satisfy the requirements of *Dorszynski.* See *Brager* v. *United States,* 527 F. 2d 895 (C.A. 8). Under the Eighth Circuit's ruling, if the sentencing judge is able to make explicit findings that he considered the applicability of the Youth Corrections Act at the time of sentencing and determined that the defendant would not benefit from sentencing under the Act, *Dorszynski* would be satisfied. Moreover, the court noted that this determination could ordinarily be made without holding an evidentiary hearing and without having the defendant present in court. *Brager* v. *United States, supra,* 527 F. 2d at 898–899.

[2] By contrast, the Second, Third, Tenth and District of Columbia Circuits have held the principles of *Dorszynski* non-retroactive. See *United States* v. *Kaylor,* 491 F. 2d 1133 (C.A. 2) (*en banc*), vacated on other grounds *sub nom. United States* v. *Hopkins,* 418 U.S. 909; *Owens* v. *United States,* 383 F. Supp. 780 (M.D. Pa.), affirmed, 515 F. 2d 507 (C.A. 3), certiorari denied, 423 U.S. 996; *Jackson* v. *United States,* 510 F. 2d 1335 (C.A. 10); see also *Bailey* v. *Holley,* 530 F. 2d 169, 173 (C.A. 7).



The Eighth Circuit's rule would ordinarily not have a significantly adverse affect on the administration of justice, since it would usually require only a *nunc pro tunc* supplementation of the record by the sentencing judge.[3] In cases such as this one, however, where the sentence is an old one and the sentencing judge has died, the burden is substantially greater. In those cases, the new judge would apparently be required to vacate the original sentence or to hold a hearing to redetermine whether the defendant would have obtained no benefit from sentencing as a youth offender.[4] In light of the substantially greater burden involved in such cases, we submit that the decision of the court of appeals in this case to apply *Dorszynski* only to cases still on direct appeal was a sensible and proper accommodation of the policies underlying retroactivity law.[5]

3. Petitioner's final claim (Pet. 25–28) is that the sentencing court took into consideration prior convictions allegedly obtained in violation of his right to

[3] That is precisely what has happened in a series of Eighth Circuit cases following *Brager.* See *Rivera* v. *United States,* 542 F. 2d 478; *DeVerse* v. *United States,* 536 F. 2d 804, certiorari denied, 429 U.S. 897; *Tasby* v. *United States,* 535 F. 2d 464.

[4] We note that the Eighth Circuit in *Brager* did not discuss these problems of remedy in cases in which the sentencing judge was no longer available, but left them for the district court to wrestle with. *Brager* v. *United States, supra,* 527 F. 2d at 899.

[5] In any event, it appears likely that even the Eighth Circuit would not have found a violation of *Dorszynski* here. In a decision following *Brager,* that court held that a sentencing judge's comments that were very similar to the comments made in this case satisfied the "explicit finding" requirement of *Dorszynski. United States* v. *Scruggs,* 538 F. 2d 214.

counsel, contrary to this Court's decision in *United States* v. *Tucker*, 404 U.S. 443. Although the sentencing court focused primarily on the seriousness of the offense, the court did note that petitioner had "a bad record before this present commitment" (Pet. App. 42–43).

In his Section 2255 motion, petitioner alleged simply that at the time of sentencing "the trial judge took into consideration past convictions of plaintiff (although he was a juvenile) when he was not represented by counsel" (Pet. App. 48, 52). The government responded (Pet. App. 64) that this conclusory statement, which failed to allege specifically what prior convictions the court had relied on and in what manner the court had relied on them, was insufficient to entitle petitioner to a hearing under Section 2255. The district court, by order (Pet. App. 20), agreed with the government that no hearing was required.

The district court was correct in not holding a hearing on the basis of petitioner's conclusory allegation. Although Section 2255 provides that the district court shall hold a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," a hearing is not required unless the motion contains sufficient factual allegations to support the claim for relief. *Sanders* v. *United States*, 373 U.S. 1, 19; *Torres* v. *United States*, 469 F. 2d 651 (C.A. 9); *United States* v. *Lowe*, 367 F. 2d 44 (C.A. 7); *Martin* v. *United States*, 248 F. 2d 651, 652 (C.A.D.C.). A denial on this ground, of course, is not a denial on the merits, and petitioner is



apparently free to present his claim, with appropriate specificity, to the district court. Review by this Court is therefore unnecessary and unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*
BENJAMIN R. CIVILETTI,
*Assistant Attorney General.*
SIDNEY M. GLAZER,
LOUIS M. FISCHER,
*Attorneys.*

MARCH 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

**No. 77-763**

---

WALTER S. BRACKETT,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

TIMOTHY N. BLACK
JOHN H. HARWOOD II
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

*Counsel for Petitioner*

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

## INDEX

TABLE OF AUTHORITIES

CASES: Page



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-763

---

WALTER S. BRACKETT,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

---

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

### Argument

In its brief opposing grant of the petition for certiorari in this case, the United States has painted with too broad a brush. It argues in effect that decisions articulating constitutional rights may be given retrospective effect *only* when those rights are designed to protect the factfinding processes on which the accuracy of determinations of factual guilt or innocence must depend. The Government also would dismiss the petitioner's retroactivity claims on the ground that they are "of diminishing importance."

The short answer to these contentions is that this Court has neither fashioned nor applied the overly simply retroactivity rule that the Government espouses. The Court

has not given retroactive effect only to those constitutional rules that are critical to assuring the accuracy of the finding that a defendant has or has not actually committed a charged offense. The Court has also made retroactive those rules that affect the extent, if any, to which the defendant may be punished as a criminal for such an offense. See *McConnell* v. *Rhay*, 393 U.S. 2 (1968); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961).

Furthermore, all retroactivity issues are "of diminishing importance" in that the number of cases presenting them dwindles as the decisions on which they rely recede in time. The amount of recent litigation surrounding the issues here raised demonstrates their still current impotance. The underlying constitutional rights are also of very real importance to this petitioner.

For a full treatment of these questions, we refer the Court to the petition.

Two assertions in the Government's brief, however, require response.

1. The United States' leading argument on the *Kent* [1] retroactivity question is that

> "by pleading guilty in the adult court, petitioner waived his claim that his juvenile waiver hearing did not meet statutory or constitutional standards." (Brief for the United States in Opposition ("Opp.") at 4.)

The cases on which the Government relies are simply inapposite.[2] All except *Wilhite*, where no *ratio decidendi* was set forth, depend upon the theory of *Tollett* and of

[1] *Kent* v. *United States*, 383 U.S. 541 (1966).

[2] *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Brown* v. *Cox*, 481 F.2d 622 (4th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *Smith* v. *Yeager*, 459 F.2d 124 (3d Cir. 1972); *Wilhite* v. *United States*, 281 F.2d 642 (D.C. Cir. 1960).



the *Brady* trilogy.[3] Those cases stand only for the proposition that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it . . . removes the issue of *factual guilt* from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (emphasis added). Thus, "a guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *Id.*

This Court has held, however, that a guilty plea is no bar to a claim that a court is, *ab initio*, "precluded by the United States Constitution from haling a defendant into court on a charge . . . ." *Menna* v. *New York*, 423 U.S. at 62, citing *Blackledge* v. *Perry*, 417 U.S. 21, 30 (1974). Petitioner's *Kent* argument in this case is just such an assertion: that because the juvenile court's waiver of jurisdiction over petitioner was constitutionally defective, the trial court lacked jurisdiction over petitioner. The application of *Blackledge* and *Menna* to this case could not be more straightforward. Here, as there, "the claim is that the [trial court could] not convict petitioner no matter how validly his factual guilt is established." *Menna* v. *New York*, 423 U.S. at 62 n.2.[4]

2. The Government concedes that, if petitioner had presented with specificity his claim under *United States* v. *Tucker*, 404 U.S. 443 (1972), petitioner would have been entitled to a hearing on that portion of his § 2255 motion. The Government maintains, however, that the District Court "was correct in not holding a hearing," because petitioner's motion did not contain "sufficient fac-

[3] *Parker* v. *North Carolina*, 397 U.S. 790 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970).

[4] See also *Journigan* v. *Duffy*, 552 F.2d 283 (9th Cir. 1977); *United States* v. *Sams*, 521 F.2d 421 (3d Cir. 1975).

tual allegations to support the claim for relief." (Opp. at 14.) In particular, citing *Sanders* v. *United States*[5] and lower court cases, the Government faults petitioner for failing "to allege specifically *what* prior convictions the court had relied on and *in what manner* the court had relied on them." (Opp. at 14; emphasis added.)

But *Sanders* does not govern the instant case. The petitioner in *Sanders* "alleged no facts but merely the conclusions that (1) the 'Indictment' was invalid, (2) 'Appellant was denied adequate assistance of Counsel as guaranteed by the Sixth Amendment,' and (3) the sentencing court had 'allowed the Appellant to be intimidated and coerced into intering [sic] a plea without Counsel, and any knowledge of the charges lodged against the Appellant.'" 373 U.S. at 5. This Court upheld dismissal of the motion because it "stated only bald legal conclusions with no supporting factual allegations." *Id.* at 19.

The § 2255 motion of petitioner in this case asserted markedly more than "only bald legal conclusions." Petitioner argued as follows in his *pro se* motion:

> "At the time of sentencing the trial judge took into consideration past convictions of plaintiff even though he was a juvenile and was not represented by counsel. This cannot be done under *United States* v. *Tucker*, 404 United States 443 (1972). By this ruling a trial judge during the sentencing process cannot take into consideration any prior convictions when the accused was not represented by counsel. *United States* v. *Tucker* was reinforced by *Argersinger* v. *Hamlin*, 407 United States 25 and Argersinger was made fully retroactive by the very recent case of *Berry* v. *City of Cincinnati* decided by the Supreme Court of the United States on November 5, 1973. See also the recent case of *Brown* v. *United States of America*, CCA 4 decided August 1, 1973 (72-1312). See also the frequently cited case of *Lipscomb* v. *Clark*, 468 F (2) 1321 CCA 5 (1972). This principle of law is fully retroactive." (A. 52.)

[5] 373 U.S. 1 (1963).



Thus, petitioner alleged specific facts and contended that those facts entitled him to relief under applicable law.

Moreover, the transcript of the sentencing proceeding, which consisted of only five typewritten pages and was before the District Court that dismissed petitioner's motion, confirmed at least some of petitioner's factual assertions. The transcript contains the following statements by the trial court concerning the records of petitioner and one of his codefendants:

> "They were prisoners in the National Training School for Boys, having been committed under the Federal Juvenile Delinquency Act for stealing automobiles. Each of them has a bad record before this present commitment." (A. 42.)[6]

The readily available sentencing transcript itself, therefore, in large part answers the objections of the Government here and below (A. 64) that petitioner's motion failed to specify *what* convictions the sentencing court considered and *in what manner* it relied on them. In these circumstances, it would be an absurd allocation of burdens to demand more specificity of petitioner's motion before he is even accorded a hearing. His motion alleged facts; the sentencing transcript alone substantiated some of those facts; this was enough to entitle him to a hearing. *Sanders* is not to the contrary.

[6] The court was here referring to petitioner's juvenile convictions for motor vehicle (one motor bike and two automobiles) thefts and juvenile home escape attempts. Court records of at least one of the convicting tribunals—the Family Court, Greenville County, South Carolina—reveal that no lawyer appeared for petitioner, who was then 12 years old. See Brief for Petitioner-Appellant, September 8, 1975, at 42 n.17.

We accordingly submit that the appropriate relief here is summary reversal with direction that a hearing be held. Petitioner should not again have to run the risk of denial of the hearing to which the Government concedes he is entitled.

## CONCLUSION

For the reasons set forth above and in the Petition, the Court should grant the Petition for Writ of Certiorari in this case.

Respectfully submitted,

TIMOTHY N. BLACK
JOHN H. HARWOOD II
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

*Counsel for Petitioner*

March 27, 1978